

VOLUME II  
JOINT APPENDIX

971

IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21147

UNITED STATES OF AMERICA, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, AMERICAN BROADCASTING COMPANIES, INC., and ABC TELEVISION AFFILIATES ASSOCIATION,  
INTERVENORS

On Appeal from an Order of the Federal Communications Commission

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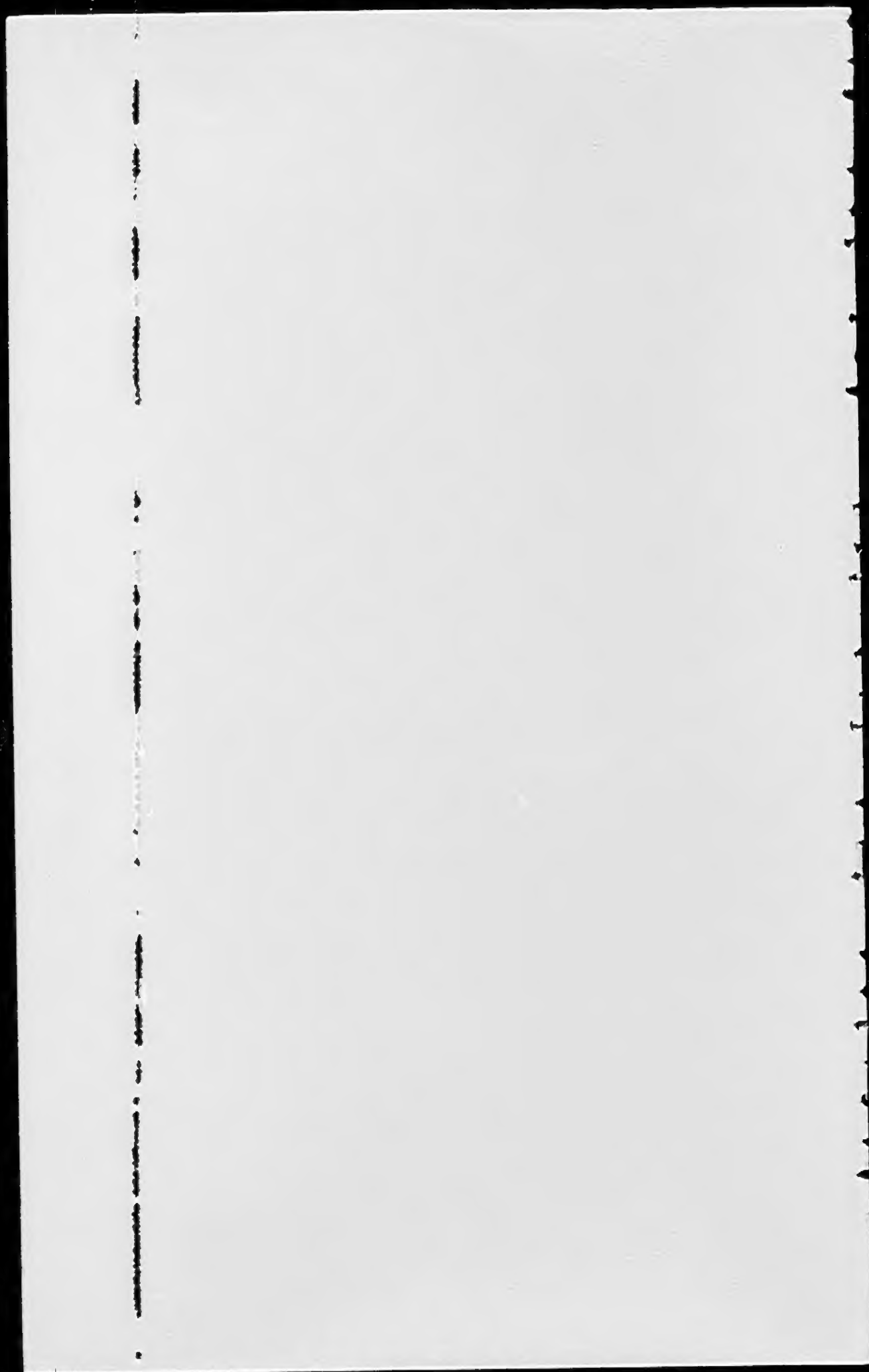
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## [91] STATEMENT OF LEONARD H. GOLDENSON

Mr. GOLDENSON. Mr. Chairman and members of the Commission:

I would like to express our appreciation to the Commission for this oral hearing, which permits our company officials and attorneys to appear in person and respond to the three issues you have raised on whether the merger of ABC and ITT will serve the public interest.

ABC will direct its primary attention to issues (b) and (c) and ITT to issue (a), although, of course, both companies are here to answer any questions you may have.

In this statement, I will summarize the reasons—which are set forth in considerably more detail in our applications and written responses—why we believe the resources which ITT will bring to ABC will stimulate competition in broadcasting, particularly in network broadcasting, and generally serve the public interest.

In a narrow sense the Commission in this proceeding will approve or disapprove the proposed assignment and transfer of our AM, FM and TV licenses in the cities in which we have owned stations.

But as you pointed out in your 1953 decision approving the ABC-UPT merger, and as is certainly true with respect to this [92] merger:

The facilities here involved are the core of a far more important segment of the communications industry—the real subject of the assignment—namely, a national network system of radio and television broadcasting.

In preparing our applications for submission to you, we focused primarily on this same general subject, that is, the effect of the merger on the ABC networks and on competition among networks.

In addition to the benefits from the merger which will flow to the public in the markets served by our owned stations, the major benefits will be to the public served by the ABC television and radio networks in the 137 markets in which we have primary television affiliates covering 93.4 percent of United States TV homes and in the 343 affiliated radio markets covering 96.8 percent of United States radio homes.

The public in the more than 100 markets where we have secondary TV affiliations—in many of which we expect to have a primary affiliation with a UHF station for there is a shortage of VHF stations in these markets—will benefit as well.

In connection with the effect of the merger on our affiliated stations, I would like to read into the record a telegram which I recently received from the Chairman of the Board of Governors of the ABC-TV Affiliates Association:

We understand that the Federal Communications Commission is holding an oral hearing on September 19, [93] 1966, to consider whether the ABC-ITT merger is in the public interest. The Board of Governors of the ABC-TV Affiliates Association unanimously supports the merger.

In our opinion, the financial and technical resources of the new company will greatly strengthen the ABC-TV network. We understand that the added resources will be used to speed conversion to color; to expand the news, sports, special events and public affairs programming; to build the projected major new studio complexes in New York and Los Angeles; and to finance new program innovations, all of which should result in better overall ABC-TV network program service.

This will result in strengthening the position of each ABC affiliate in its local market, enabling them to attract new audiences and improve their own local service to the public.

In evaluating the ABC-UPT merger in 1953, you considered the following:

(a) the place of networks in our system of radio and television broadcasting;

(b) the emergence of ABC in 1943 as an independent network as a result of the Commission's network investigation, including the growth and accomplishments of ABC since 1943;

(c) the continued dominance of NBC and CBS in [94] network broadcasting and the reasons therefor, including the handicaps under which ABC has operated and its resultant inability to provide the amount of competition which might have been expected from its establishment as an independent network;

(d) whether the merger with UPT will stimulate competition and result in an overall improvement of network service; and

(e) whether the merger will lessen competition or tend to monopoly.

I respectfully suggest that these same considerations might well govern your evaluation of the ABC-ITT merger.

I feel sure that it is unnecessary to dwell at length on the place of networks in our system of radio and television broadcasting. Time and again the Commission has recognized network contributions to the public interest.

As recently as 1960, you restated your conviction that:

The national networks have made invaluable contributions to the development of our system of television broadcasting and that networking is necessary to the continued growth and expansion of the service.

In the areas of worldwide and outerspace television which lie immediately ahead, the importance of networks will certainly not diminish.

You have also recognized that competition among networks [95] is in the public interest. In fact, ABC owes its existence as an independent network to the Commission's concern with stimulating competition among the networks, for it was the Commission that required NBC, which until 1943 owned both the NBC and ABC radio networks, to divest itself of one of the two.

It was this same concern that, in 1953, led this Commission to approve the merger of ABC and UPT. You there pointed



out that the merger would provide ABC with the financial resources "to carry out its plans to strengthen its programming and improve its physical plant and thereby provide substantial competition to the other networks, enabling both its owned and operated stations and its affiliates to improve their service to the public, and stimulating the other networks and stations to compete in turn."

The accomplishments of ABC since 1953 have vindicated the Commission's actions requiring NBC to divest itself of one of its two networks and allowing ABC to merge with UPT. The ABC-TV network is providing a program service during almost twice as many hours each week as it did in 1952 and to more than twice the number of primary affiliates.

It has established a news organization which spans the globe. Its broadcasting revenues have increased from approximately \$60 million in 1952 to \$361.5 million in 1965.

But, as shown in the data we have submitted, despite ABC's growth in service and the increase in homes reached, a [96] substantial gap still exists between it and the other two TV networks. In fact, in recent years, the trend, in some respects at least, has been for the gap to widen, rather than contract.

While the over-all company has earned a profit, the ABC television network has operated at a loss during the past three years. From a profit of \$3.3 million in 1962, the network dropped to a loss of \$4.6 million in 1963, a loss of \$8.4 million in 1964, and a loss of \$5.6 million in 1965.

In contrast, the combined profits of the other two networks during this period have risen from \$33.4 million in 1962, to \$61.0 million in 1963, \$68.6 million in 1964, and \$65.0 million in 1965. Although ABC's TV network losses during these three years have been more than offset by the profits of the ABC-owned TV stations—\$16.2 million in 1963, \$21.9 million in 1964, and \$25.5 million in 1965—ABC's share of the total broadcast profits of the three networks and their owned stations has dropped.

In 1962, ABC's share was \$20.2 million of a total profit of \$111.4 million (18 percent). In 1965, it was \$19.8 million of a total profit of \$161.6 million (12 percent).

During this period, total industry broadcast revenues and profits increased rapidly: revenues from \$1,486.2 million in 1962 to \$1,964.8 million in 1965, and profits from \$311.6 million in 1962 to \$447.9 million in 1965.

ABC shared in the increased revenues, of course, but its [97] increased costs of operation—due to an expanded operating schedule, increased commitments in news and public affairs, and the rising charges for programming rights—more than outdistanced the increased revenues.

For example, between 1961 and 1965, program expenses for the TV network alone increased by \$50 million—from \$136 million to \$186 million, including an increase in our news and public affairs costs from \$10 to \$28 million.

These changes in ABC's financial position have occurred at a time when networking is entering an era in which resources far beyond those envisioned in 1953, and even those envisioned a few years ago, will be necessary to compete.

Some of the increased financial requirements are already evident; others required in the very near future as global TV becomes a reality and as we enter the space age can only be vaguely predicted.

Illustrative of the requirements for plant and equipment already known and planned by ABC are \$34.0 million (in addition to \$10.0 million already spent through 1965) for conversion to color; \$17 million (in addition to \$6.5 million already spent) to purchase and furnish ABC's new office headquarters building in New York City; and approximately \$90.0 million for constructing and new studio complexes to be built in New York and Los Angeles as part of our long-range plan.

[98] As substantial as are these expenditures for plant and equipment, they are small in comparison with network programming costs. To program the 24½ hours of prime time (7:30 to 11 p.m., seven days a week) will cost ABC, on the average during the 1966–1967 season, \$2,650,000 per week.

To these costs are to be added the ever-increasing expenditures for news, special events, and public affairs, which are loss items to all three networks, and particularly to ABC.

Coverage of major events of public importance such as the

space shots, elections and conventions, and Vietnam, place an ever-increasing burden on the television network.

The increased costs of entertainment programming, although usually recoverable from sponsors if the program is a success, also are rising sharply, as I have already indicated.

The substantial increase in the use of feature films in prime-time network schedules during the past season, and proposed by all three networks for this season, gives indication of continuing.

Multi-million dollar commitments will be a normal requirement for prime-time feature film; for example, the cost to ABC of network rights to "The Robe" and "The King and I" was \$4 million.

Each year the TV rights for professional sports have escalated, with the figures far in excess of what was thought possible in the 50's. Sporting events not heretofore shown in [99] television are being brought into the home.

Although initially planned before the ITT merger, ABC has been proceeding with "ABC Stage 67." This is one of the most ambitious projects ever undertaken by any network, and it is expected to bring a new dimension and vitality to television programming.

The first program was broadcast on Wednesday, September 14. Whether such spectacles are to be a continuing feature, rather than an episode in our television development, is dependent in part on the financial resources available to ABC in the future.

During the six-month period, July-December 1966, the ABC Broadcast Division will have cash requirements substantially in excess of cash flow. This cash requirement is being met by the use of borrowed funds. ABC's loan indebtedness five years ago was \$52.5 million. It is now \$80 million, and will shortly be increased to \$92.5 million.

In 1954, the first year following the ABC-UPT merger, more than 60 percent of the gross revenues were from its theatres, with less than 40 percent from its broadcasting operations.

By 1965, the ratios had changed to the point that broadcasting and related revenues represented approximately five-

sixths of the company's annual gross. Thus, as in 1952, ABC is once again largely dependent on revenues derived from its broadcasting operations.

[100] ABC is a smaller company, with far fewer shares of capital stock outstanding, than either of its two network competitors. Its business activities are largely limited to entertainment—a highly volatile and cyclical business.

As a consequence, a drop in program ratings, even of relatively small amount or of temporary duration, can have a major impact on its publicly-traded shares, causing substantial dips in stock prices.

The knowledge that this can readily occur places a restraining influence on management's ability to incur important long-term commitments essential to program improvement and tends to keep innovation, with its attendant high risks, at lower levels.

It also exerts pressure to keep to a minimum the losses inevitably incurred in news, public affairs, and special events programs.

With broadcasting costs accelerating as they have in recent years, and television networking entering a new transition stage, with the gap still existing between ABC and its competitors, our company's Board of Directors found the conclusion unavoidable that ABC should seek to broaden its base of operations by joining forces with a company with greater capital resources; with more diversified earnings and broader technical experience.

By associating itself with ITT, a company with five times the capitalization of ABC, with widely diversified business [101] interests, and with four times ABC's resources, ABC, as part of the ITT organization, will have a broader financial base and, therefore, will be less affected by the wide fluctuations in earnings that are typical of the television networking business. The result should be greater financial stability and greater freedom to plan and develop for the future.

ITT's contributions to ABC will not be limited to financial support. The proposed merger will make available to ABC and the network industry the results of ITT's extensive research.

knowledge, and technological know-how, including its leadership in international television, space-age developments, and synchronous satellites.

At the same time, ITT's association with ABC can be expected to stimulate and facilitate still further technological achievements by ITT to the benefit of the communications industry and the public, as well as to ABC.

Concern has been expressed that ABC may not be able to maintain its separate identity in ITT but instead become but a subordinate adjunct of a company with far wider interests.

The same question was raised in the merger of ABC and UPT in 1953. Based on my 13 years experience at ABC and UPT, and on understandings which we have reached with ITT and which are set forth in the agreements between the two companies, I am convinced that the ABC broadcast activities, as part of ITT-ABC, will be as unsubordinated as they have been as part of UPT-ABC, and that [102] the association between the two companies will greatly contribute to the advancement and improvement of broadcasting service, without the occurrence of any inhibiting influences.

There are many highly diversified companies which have been broadcast licensees for decades and which have been among the pioneers of the radio and television industry, contributing much to the development of the art.

Included in this group are Westinghouse, General Electric, RCA, Avco, and General Tire.

There are also other major companies with interests in broadcasting which also have interests in other activities, such as magazine and newspaper publishing, which, in a broad sense, may be considered as competitive to broadcasting, including Meredith, Triangle, Hearst, Scripps-Howard, Time-Life, Chicago Tribune, Cowles, Cox, Metro-Media, and others.

In all of these situations, particularly where the owners are in competing businesses, there is some theoretical possibility that the welfare of broadcasting will be subordinate to that of the other business activities. But experience has shown that this has not occurred, and, if contrary to experience, it were to occur, the Commission has adequate regulatory authority to insure that the public interest is protected.

Nor would a combined ITT-ABC be so large as to dominate its competitors. There are multiple and strong radio and TV station competitors in the six markets in which ABC will continue [103] to own stations.

Its TV network, for the foreseeable future at least, will still be behind CBS and NBC in terms of affiliates, audience and billings, although it can be expected that this gap will be narrowed.

ITT-ABC would be comparable to RCA-NBC on a resources and diversification basis. CBS, barring a major expansion of its activities, would be a smaller company than ITT-ABC, just as it would continue to be smaller than RCA-NBC; but CBS has been large enough, and its management more than sufficiently competent, to accomplish the notable achievements described in its 1965 annual report as follows:

CBS television network was the world's largest advertising medium for the 12th consecutive year, attracted the largest audience in broadcasting for the 11th consecutive year and maintained its unbroken record as the Nation's most popular medium of entertainment and information. Daytime sales reached an all-time high with advertisers spending almost as much on the CBS Television Network as on the other two networks combined.

A question has also been raised as to what effect the strengthening of ABC would have on the possible emergence and success of a new national network or networks. This question enters an area of almost complete speculation in which a crystal ball is probably the most useful tool.

[104] With this qualification, I think that our experience at ABC in developing the third network, in competition with two stronger and older networks, might be of some use in your consideration of this matter.

[105] In approaching this question, it must first be recognized that, unlike most business activities, television broadcasting is an industry in which the amount of competition possible is subject to the artificial restriction of channel availability.

Stated another way, and in the absence of a regulatory forced sharing of affiliates, no matter how great the viewer demand,



a fourth network, at least one providing a comprehensive schedule of the ABC-CBS-NBC type, is dependent for its success on the availability of four or more competitive channels in each of the major markets.

As Congress recognized in enacting the all channel law, a fourth network will not be feasible until there are enough UHF stations in operation and there is substantial and effective UHF receiver circulation in the many important markets which now are limited to three or fewer VHF channels.

A second basic consideration is the availability of advertiser support on the national level. Until recently, the three existing networks competed in what was referred to as a 2 and 1/2 network economy meaning that there was only enough television advertising to support 2 and 1/2 networks profitably.

The result was that many programs, at the end of the selling season, were sold at cut rates, often at a loss. This was particularly true of ABC with its shorter station lineup and fewer homes reached. Even with the business boom of the last [106] five years which has seen the emergence of a three network economy the ABC network still operates at a loss. If we were to enter a period of business recession, we could very well return to less than a three network economy, hardly an environment in which to start a fourth network.

A third deterrent facing a new network is the very real shortage, and cost of product and talent to meet television's ever expanding program demands. This problem also existed in the early days of radio, but was solved in post world war II by the use of records and transcriptions, which made possible the vast upsurge in the number of radio stations during the late 40's and 50's. For a variety of reasons, the equivalent problem in television has proven much more difficult to solve.

Despite these deterrents to new network operation, I believe it is more likely than not that at least one new commercial TV network will eventually succeed.

It may start by offering a limited number of hours of program service such as the Sunday Night Network that was projected a short time ago; or by offering a program service that, in part at least, will be offered during hours not now programmed by



all existing networks, such as the recent proposal to originate a late night show from Las Vegas; or as a sports service, such as that already offered by the Sports Network; or as a service aimed at the minority viewer who does not find enough to his liking in the service of the [107] existing networks, such as is being developed by the Marshall Field station in Chicago.

There is one development in process which should substantially ease the burden of starting a fourth network. I refer to satellite transmission, which will make it possible for a fourth network to commence with interconnection costs substantially below those now paid by the existing networks.

It would be desirable of course that a full scale fourth network have available resources comparable to those available to the other three networks, including a combined ITT-ABC. But if a network were to aim at fulfilling a need not satisfied by the existing networks, resources of this size might not be required. It seems probable that a new commercial network would not, at the outset, attempt to compete in the low return special events and public affairs areas.

It seems that we can be certain that if there are stations available, and if there is sufficient demand, there will be a new network. Its organization, the audience to which it will cater, the kind of service it will provide, its method of interconnection, are all matters necessarily in the realm of speculation, as is the question of when it will come into being.

Any concern that the strengthening of ABC will have an effect on the ability of this fourth network to compete is highly speculative. Since its emergence will largely depend on the success of UHF, it seems that any impetus to the success [108] of UHF, such as the strengthening of ABC will provide, will be the one relatively predictable effect of the merger on the prospects for a fourth network.

To summarize, the benefits that will accrue to the public interest from strengthening ABC are substantial, immediate and predictable. Compared to its two competitors in network broadcasting ABC is both smaller and less diversified.

Its needs for capital are great. It must keep up with its rivals in developing color broadcasting and new forms of programs.

New studio complexes must be constructed. Yet it is relatively handicapped in acquiring funds in the open market and has less capital internally available than its competitors.

The value of its stock is subject to wide fluctuations owing to the limited number of outstanding shares and the relative volatility of the entertainment field in which ABC is concentrated, while its less extensive network facilities lead to smaller earnings and relatively greater discount of its prospects by the capital market, so that its capital disadvantages actually become cumulative.

Merger with ITT, a company five times as big and far more diversified, should change this. It will enable ABC to take greater risks of innovation in programming, without so much danger of disastrous consequences, thereby improving quality and diversity.

It will permit more special events and public affairs [109] programs. It will speed ABC's conversion to color and facilitate its expansion of satellite transmissions. It will further the growth of UHF, in which ABC has a large stake and which it can speed up if more resources are available.

Thus it seems clear that the proposed merger between ITT and ABC would generally serve the public interest and that its effect on competition in broadcasting would be consonant with and would promote competition in the broadcasting industry.

In closing, may I again take the opportunity to thank all the members of this Commission for the courtesy you have extended to myself and my colleagues in permitting us to come here today.

Mr. Chairman, if I may, this completes my written statement. I would like to add briefly to the statement by responding to certain of the specific questions set forth in the memorandum of the Broadcast Bureau and the Common Carrier Bureau, which I received after my written statement was completed.

One of the questions raised by the Bureaus is whether the merger of ABC and ITT will create competitive conditions which would impel CBS toward a similar merger. This question is similar to the question of the effect of the merger on the establishment of another network, a subject which I have endeavored

to cover in my written statement. Like that question, I find this one also largely requires a great [110] deal of speculation.

As I have pointed out in my written statement, even though CBS is not as large a company as RCA-NBC, it has been the world's largest advertising medium for 12 consecutive years and has attracted the largest audience in broadcasting for 11 consecutive years.

It has done this in competition with RCA-NBC with resources which will be comparable to a combined ITT-ABC. And it has done this without finding it necessary or desirable to merge with a larger company.

I do not believe that this is an area of real concern. Like the effect of the ABC-ITT merger on the development of a fourth network, the conceivable effects that the merger would have on CBS' ability to compete are speculative, remote and uncertain, while the advantages to competition in broadcasting from approving the ABC-ITT merger are immediate, probable almost to the point of certainty and substantial.

The other specific questions raised by the staff's memo on which I would like to comment briefly are summarized in that memo under the heading "Potential Benefits."

They are concerned with what improvements, extensions or enhancements of ABC programming services to the public may be reliably expected from the merger, what these improvements will cost in terms of dollars, and whether ITT is prepared to insure the Commission that it will make available [111] to ABC whatever extra funds are needed to meet these expenditures.

May I observe that in our applications and in the letters of July 25 which Mr. Geneen and I wrote to the Commission in response to your letters, we tried to make clear that improvements can be expected, that they will be costly, and that ITT will back these costs.

I have again talked with Mr. Geneen since the staff memo was received and he has again assured me, and he will also again assure you today, that this will be done.

Reduced to its essence the plan of the combined ITT-ABC is to establish a network which is truly competitive with NBC and CBS—in terms of homes reached, share of audience, share of billings, hours of programming per day and most impor-

tantly in news, special events and public affairs. This will mean more affiliates, many in the UHF band.

It will probably mean some expansion in our operating schedule into the early morning hours, assuming that our affiliates agree.

We have on our drawing boards plans for an early morning news show originating from Washington, D. C., which again, with our affiliates' approval, we hope to initiate as soon as we have absorbed our current expansion into late night.

In the areas of mass appeal entertainment shows, where I believe we are already reasonably competitive, the [112] principal need will be for the additional funds required to meet the ever rising costs. As I have indicated, it is highly important, if not essential, that management of a network be as free as possible from the restraining influences that a drop in stock prices caused by a drop in program ratings can have on ability to incur long term commitments, which are essential to program improvement, experimentation and innovation. Without this latitude, programs of the ABC stage 67 type would not be feasible.

In the area of entertainment shows, we already pay as much as do NBC and CBS—if we did not we would not get the shows. Our problem here, as it has been for so many years, is that our—ever since the original merger of ABC and UPT, is that our shorter affiliate line up means that we get less from advertisers for these shows than do the other two networks and consequently are not able to generate the same amount of profit as they are able to generate to support the loss incurred in programming public affairs.

For example, in sports alone our budget has increased from \$20 million in 1966 to \$24 million in 1967 and \$38 million in 1968 with the extensive Olympic games coverage now planned. As you know, we have the winter and summer Olympics.

I have noted that the staff has directed the main emphasis of its questions, and I believe properly so, to the areas of news and public affairs, for it is in these areas [113] that I believe the results of the merger will be most felt—where the ITT resources are most needed, where the beneficial effects of the merger will be most evident.

These are the red ink areas which have caused our network to operate at a loss during the past several years. It is in these areas that the many stakes in broadcasting are changing enormously—the space shots leading up to the landing of a man on the moon; the convention and election coverage which in 1968 will be in color and will cost us at least \$10 million, up from \$5 million in 1964; the deepening of the Viet Nam conflict which TV and radio again cannot afford to treat routinely both because it would be a disservice to the nation and because it is important to our status as a news medium; and the technological innovations that are making TV a world wide medium.

We are proud of the accomplishments we have made in these areas at ABC. Considering the fact that our network has operated at a loss while our competitive networks are making profit, we believe that we have performed magnificently but we would be the first to acknowledge that it is in these areas that we have the farthest to go to be competitive.

In television news we contemplate a sharp increase in overall expenditures—from \$26 million in 1966 to \$30 million in 1967 and to \$40 million in 1968 where we are planning extensive convention and election coverage in color.

[114] And in radio news, we budget over \$3 million annually to sustain the operation of our radio network which is operated on a loss basis. More pertinently ABC recovers only 25-30 percent in these service areas, a far lesser sum than do the other two networks.

And to a greater extent due to the lack of coverage, as far as CBS is concerned, in regard to other networks.

I understand that Mr. Geneen will also address himself to this in supplemental comments to his prepared statement.

In closing, may I again take the opportunity to thank all the members of this commission for the courtesy you have extended to me and my colleagues in permitting us to come here today.

[121]

#### ARGUMENT OF MR. COHN

Mr. COHN. ITT basically engages in three types of activities. It is first of all primarily a manufacturing company, engaging in telecommunications operations, financial services and

other services. Forty-six percent of its business, according to its 1965 annual financial statement, came from telecommunications manufacturing, and I underscore the word "manufacturing"; 16 percent of its income came from defense and space activities; 14 percent from commercial and industrial products; 8 percent from consumer products; 8 percent from various consumer and business services; and only 8 percent from telecommunications operating companies.

It has lent money to six separate CATV entrepreneurs. It has lent approximately \$7 million. This is 6 out of 1600 CATV systems in the United States, and \$7 million which it lent as compared to the \$200 million which has already been invested [122] in CATV.

\* \* \* \* \*

[163]

#### STATEMENT OF HAROLD S. GENEEN

Mr. GENEEN. This Commission is, of course, already acquainted with ITT, and some of its management, since ITT subsidiaries are licensees of the Commission in the common carrier field. We believe that our record in carrying out our responsibilities to the public in the common carrier communications field demonstrates our capability of carrying out the responsibilities of a licensee in the broadcast field.

[164] The majority of our directors are leaders in their professions and fields of endeavor and are not regularly employed by the company. They come from various sections of the country.

ITT, as is described more fully in the record, is a technologically oriented and diversified company. It spends in excess of \$182 million annually in research, development and engineering in laboratories located here and abroad.

We believe that an efficient, capable and responsible management is crucial to the satisfactory performance of all business; but particularly important to those businesses which are not only held by a broad cross section of the public but which also discharge a public trust.

It is of critical importance to the community in which it operates that the management of such companies fully carry out the obligations of good corporate citizenship.

I believe that ITT can be rightly proud of its own management team, and particularly its proven performance in fulfilling these responsibilities as a good corporate citizen.

ITT and its subsidiaries employ approximately 200,000 persons. These companies are managed and guided by more than 1,300 executives, most of whom have made ITT their career.

Actually about 50 percent of them have ten years or more of service, and there are a great many with [165] thirty or more years of service. Much of this long term service has been with one company or division in this system.

In fact our average turnover of executives is in the 5 to 6 percent range as shown in the exhibits filed with the commission. Based upon generally accepted experience, this would be considered good performance.

Moreover, there has been a minimum of management turnover in the companies recently acquired by ITT. Analysis of top management turnover in the larger companies acquired by ITT in the United States since 1961 shows that 73 percent of the chief executives are still with ITT and that 15 percent retired; and that 80 percent of the second level key executives are still with ITT and that 3 percent retired.

It is readily apparent that this diversified organization must necessarily place a large degree of responsibility upon the individual local management of each separate company or division for carrying out the day to day business operations of the unit, as well as for prompt recognition of problem areas, problem solving, and for short and long range business planning.

Thus under the ITT management system, substantially autonomous company and division managements are charged with the responsibility of meeting local area problems and the public's needs.

However, because these companies and divisions are a part of the ITT system, they have added resources with which to [166] meet those responsibilities when help is needed. Thus the activities of the ITT headquarters are primarily directed toward assisting the management of each of the various companies and divisions in meeting their responsibilities to customers, stockholders, and employees and the public.



We coordinate research and development so as to focus efforts to gain maximum results for the time and energies expended and to avoid duplication.

In addition, we maintain an experienced staff to help these individual managements develop skills and keep up with the latest thinking.

Among the skills which we have sought to have each of these local managements acquire are those of professional management, such as forecasting techniques, business planning, market and product research, all designed to eliminate drastic swings in production with its attendant hardship on employees.

We also help them by providing funds for their operations and expansion and by providing advice on customer, employee, public and community relations, as well as legal advice, all with a view to enhancing their efforts to meet the responsibilities of being good corporate citizens in the communities in which they are located.

However, essentially the creative management functions of ascertaining public needs, of preparing the necessary plans to meet those needs, and of carrying out those plans, [167] must necessarily rest upon the shoulders of the individual presidents and managers of each of the ITT companies and divisions under the generalized management supervision of one of our ten Group Executives, one of our four Executive Vice Presidents, and the President of ITT.

The proposed method of operation of ABC as a substantially autonomous subsidiary, with the present ABC management and its distinguished board of directors, is harmonious with the present ITT management system and can be carried out in the manner contemplated in the application in full accord with ITT's responsibilities to the public and to the FCC.

Matters of major importance will be submitted to the ITT Board of Directors for approval before becoming effective.

We believe that one of the essential elements of the merger with ABC is the continuation of the services of its well organized, and highly experienced management group. And it is ITT's intention as expressed in the contractual arrangements with ABC—to look to Mr. Goldenson and his management team to maintain the high standards of public service which they have so capably carried out in the past.

We are convinced that ABC's management is an outstanding one. It has been my privilege to meet and observe ABC's management team in action at both the company level and at industry meetings. The management team is young, capable and purposeful.

[168] And the record shows that this management team has been highly effective under the leadership of President Leonard Goldenson and Executive Vice President Simon Siegel.

As is pointed out in detail in the materials already submitted to the Commission, ABC will operate as a substantially autonomous subsidiary.

I can assure you without reservations that the broadcasting operations of ABC will be kept separate from other ITT operations, and the operations of ABC as a licensee will be performed unaffected by commercial, communications or other similar interests of ITT.

The Board of Directors of ABC will consist of the same fourteen men of outstanding ability who are presently directing its affairs with the addition of myself and Mr. Hart Perry, whom I introduced to you a few moments ago.

In addition the ITT Board of Directors, which now consists of sixteen members, will be increased by the addition of Messrs. Goldenson and Siegel, plus two additional outside directors designated by ABC.

This interchange of Board members which will result in six directors in common, and the fact that I personally, together with one of our highest executives, will sit on the ABC board, will give you further assurance of our intention of carrying out our responsibility to the full extent that the Commission desires.

\* \* \* \* \*

[171] It is, of course, possible that there might be some difference of opinion between ABC as a broadcasting subsidiary of [172] ITT, and some other subsidiary or division of ITT, on the question of how the FCC should resolve particular satellite or other communications questions in the best interests of the public.

In that event, the ITT management system of substantially autonomous subsidiaries will enable and, in fact, require both divisions to present their separate views to the Commission—

along with the views that will be expressed by all other interested companies, persons and agencies who will be appearing before the Commission.

\* \* \* \*

[176] In addition, as Professor Saulnier has pointed out in his analysis, ABC will be far more important to ITT than any of its other subsidiaries or divisions; and consequently, there would be no conceivable reason for taking any action which might jeopardize the interests of ABC or adversely affect its reputation and acceptance by the public, or taking any action which might affect its standing as a broadcast licensee.

\* \* \* \*

[177] The Staff Memorandum also asks whether ITT's manufacturing and service activities would "adversely affect freedom of competition in the solicitation and placement of broadcast advertising."

Since the bulk of the products and services offered by ITT in the United States are primarily technical and industrial [178] products which are sold to industrial customers and not to consumers, ITT has engaged in very little television or radio advertising in the United States.

Total United States television advertising during 1965 by ITT and its subsidiaries amounted to approximately \$500,000; and total United States television advertising for 1966 is expected to be less than \$1,700,000. And all of this amount is for spot advertising on local stations, rather than for network advertising.

In addition, the application which has been submitted to the FCC in this matter contains the express representation that any facilities which may be purchased from the applicant for the purpose of advertising products or services of an associated company will be, I quote:

At the then prevailing charges for such facilities and on a basis no more advantageous or preferential to such associated companies than for any purchaser of facilities from applicant.

Similarly, I can assure you that there will be no interference with advertising on ABC by competitors of ITT.

Under these circumstances, I think that it is perfectly clear

that the commercial and advertising activities of ITT could not conceivably have any effect upon competition among advertisers or prospective advertisers for broadcast time and opportunity.

SUPPLEMENTAL ARGUMENT OF MR. McKENNA

[205] Commissioner LEE. At what point would ABC begin to think in terms of affiliating with the U's? I appreciate you are affiliated—where, in Jacksonville?

Mr. McKENNA. Yes. We have thought often of that, Commissioner, and I can't put it in terms of precise set penetration. It depends market by market. As you know, we every several months add another one, even without the advantages that ITT would bring.

Certainly as time goes on, ABC will add more U's. If we have an opportunity to get a V, I think it would be a disservice not to take it. But realistically, these opportunities are restricted. We haven't been able to get many over the years. Hopefully, we will get some more. We realize that more and more we will be relying on U's.

[213] TESTIMONY OF LEONARD H. GOLDENSON

Mr. GOLDENSON. As I said this morning, we will take down the additional \$12½ million of that \$25 million by the end of the year, I think, which means we will be up to \$92,500,000. That does not take into consideration the building of our complex both on the West Coast and East Coast which we estimate will be close to \$90 million.

Based on the funds that we will have available, we will just have to spread that over a period of years. With the ITT merger and with the discussions I have had with Mr. Geneen, I think this can be accelerated to a very great degree.

So I would say that over and above this \$25 million we borrowed, which will get us onto a loan of \$92,500,000, I would think that another \$90 million would be necessary.

\* \* \* \* \*

[214] Commissioner LEE. With respect to the network losing money, I seem to recall that there was a period when you were making a little money.

Mr. GOLDENSON. That is right.

\* \* \* \* \*

Commissioner LEE. What has happened? Is that color and program costs?

Mr. GOLDENSON. In 1962, if you will recall, we were making money, and we made money in 1960, 1961, and 1962. If you gentlemen will recall, when we had the merger approved in 1953, the first job we had to do was to establish ABC from an entertainment standpoint at night. After we were established from an entertainment standpoint, we then had to try to establish ourselves in the field of sports.

Seven years ago we went into daytime. Then about five years ago we were then only spending approximately \$3½ million a year in news, and we knew if we were going to be competitive in every respect with NBC and CBS, we had to go into the news which was losing money.

We went to our board and we said that for the next three to four years minimum, and possibly five years, we feel that we have got to invest upwards of \$25 million to \$30 million a year to develop a competitive news organization and that this would entail our losing money in the network, over a period of at least three to five years.

Therefore, we have increased our news cost from [215] approximately \$3½ million to \$4 million to this year we will be spending \$26 million, and we are projecting \$30 million for next year, and we are projecting that we will be spending \$40 million a year by 1968.

Commissioner LEE. What part, if any, of the costs of the O. and O. stations is charged to the network?

Mr. GOLDENSON. None at all, they stand on their own.

Commissioner LEE. Your bookkeeping has remained the same?

Mr. GOLDENSON. Absolutely, it is entirely separate.

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Commissioner LEE. I think that is all, Mr. Chairman.

[224] Commissioner JOHNSON. I have really tried to comprehend myself just what benefits come out of this proposed merger, without even reaching the issue of what is the public interest and without even reaching the issue of how do you offset the detriment to the public interest that results from the merger.

I start off with sort of a paraphrase of old Secretary Wilson's observation, of what is good for General Sarnoff is good for America.

I am trying to comprehend why this even serves ABC's short individual short-term interest, and then I will have the same question for Mr. Geneen later on. You and others who have testified on behalf of ABC have continually referred to the problem of affiliates. How is it that the merger with ITT is going to put ABC in a stronger position in the markets in which you are now competing with NBC and CBS? How will this enable you to get better affiliates or more affiliates than you now have?

Mr. GOLDENSON. Well, Mr. Johnson, when you are planning and programming, we are now planning and programming for the fall of 1968. Sometimes you have to plan two to three years in advance. When we are projecting our news, you have to try to project two to three years in advance, as to what you are going to do.

[225] As an example, when we hit on doing an African series on the African Continent, we planned that a year in advance, which will come on the air next April. We will be spending for that \$1½ million or more for that one evening, when we preempt prime time.

A year following that, we are planning to do another Continent, and a year beyond that we are planning to do another Continent.

A lot of your profit at nighttime, the nighttime programming and your daytime programming, the profit you make has to cover the losses you have in news and public affairs. That is true of the profit of the station in our case.

Since we are so limited in our facilities as compared with CBS and NBC, we are more volatile than they are. Therefore, if on a given season our ratings should be off, and our stock goes down, we have our stockholders crying. "What about your profit? It is going down," and so forth and so, and therefore we have to pull in our horns on the area where we are losing money, namely the news and public affairs, so that the public is harmed as well as our own stations who want an outstanding news and public affairs organization as far as ABC is concerned.

So it puts us at a very great disadvantage as compared with

NBC, where they can plan three to five years in advance, and are not subject to the vagaries of ratings at night, and by making this deal, in the discussions we have had with Mr. [226] Geneen and his Board, they are fully cognizant of the fact in our long-range planning if we are going to build a solid organization to be competitive, we have to plan that way even though our ratings might be off at night, and we are not going to be subject to these pressures, so that the public as a result, will benefit by a long-range planning on news and public affairs, as well as your affiliates, and that is why your affiliates welcome this.

Commissioner JOHNSON. Well, I suspect it may very well be that I haven't understood you, rather than you haven't responded to the question, but the question is: If your problem is one of getting affiliates, and if your problem is that in markets where CBS is first and NBC is second you are third, or if your problem is one of getting an affiliate in a market where there are not three stations, how will your merger with ITT enable you to get more affiliates or get better affiliates than you now have?

Mr. GOLDENSON. If the affiliates know that through a long-range basis you are going to be consistent in your planning, so that you are going to build solidly over a period of five years, the affiliates will have one outlook as compared with an organization that might be volatile based on ratings at nighttime, and therefore they will be certainly more independent in associating with ABC than they otherwise would.

Commissioner JOHNSON. They would be interested in [227] disassociating CBS and NBC?

Mr. GOLDENSON. It is possible, if we are growing on a good basis. Let me say this to you: that basically our problem as the problem is that since we came in last, and when we started we only had, if I recall, about 14 or 15 basic affiliates in 1952, and we have built to 137 affiliates now, we have tried over the years to take away affiliates from CBS but they have these old, long line affiliations that we haven't been able to budge.

So we have to associate ourselves and we will have to probably with the last stations in, which are the UHF stations.

Commissioner JOHNSON. That is my point. How will this merger affect that situation one whit?



Mr. GOLDENSON. Because, if we can long-range plan our news and public affairs and build a solid news and public affairs organization as well as an entire solid organization, the UHF's are going to benefit because we will force conversion of those sets in the homes to UHF, in the UHF towns, where there may be two V's, and a "U". This is long-range and it can't happen overnight, and it may take, as I have said to members of the Commission from time to time, this is a five- to seven-year job, to get these conversions, because at the present time you only have about a 10 percent conversion to UHF.

Commissioner Cox. Commissioner Lee won't agree to that.

Commissioner LEE. As a matter of fact, the last Census [228] Bureau survey a year ago was 22 and we have another one conducted this month, the results of which we don't get, but I think it will be about 37.

Mr. GOLDENSON. The only problem in connection with that is that there may be sets sold since April with UHF on the sets, but the trouble is, is getting the people in the homes to convert their antennas to receive it. I am not arguing how many sets have been sold with UHF. I am talking about the conversions at the marketplace, and I say that the conversions haven't been taking place unless you have the kind of programming that is going to force conversion, and I am trying to address myself to Mr. Johnson's question, that we will improve that programming to force those conversions.

That is how the public interest is going to be served by this, because we can plan three to five years in advance, whereas now we have to plan year to year, because if we are going to take losses at a big rate, and be off in our night sales, nighttime sales, where we make our profit as well as daytime, we are going to have to pull in our horns on news and public affairs. [229] Commissioner JOHNSON. Again, I gather your revenues have gone from some \$60 million a year to \$360 million a year from 1952 to 1965.

That is a six fold increase.

Mr. GOLDENSEN. That is right.

Commissioner JOHNSON. I gather what you are telling the Commission is that that is really not adequate. What would you have viewed as adequate during that period?

Mr. GOLDENSON. If we had received equal facilities in the marketplace with CBS and NBC, we then would have been able to return the type of gross and we would not have had to sell the last 15, 20 or 25 percent of our programming at a discounted rate, which is virtually a fire sale, and which forces us into the red.

Commissioner JOHNSON. A six fold increase in 13 years would be—is obviously not enough in your judgment. How fast do you think you should have increased?

Mr. GOLDENSON. Exactly at the same rate as CBS and NBC in the marketplace. Originally when the merger took place in 1953, the question arose as to whether we, taking hold of ABC, would make then a competitive network.

My statement to the Commission was then, and it is now, if you give us equal facilities in the marketplace, we will deliver you a competitive network.

Against the odds of not having competitive facilities, in the marketplace, I think we have developed a reasonably [230] competitive network, but not one that is completely competitive with NBC and CBS. I ask in the public interest that this be given an opportunity to happen.

Commissioner JOHNSON. Do you really have trouble in getting the financing that you need? You now state you have some ninety million dollars debt, and Commissioner Lee earlier suggested you just picked up another \$25 million?

Mr. GOLDENSON. No. The \$80 million includes \$12 million 5 of that 25, and the additional 12.5 we will be picking up before the end of the year will make \$92 million 500, which does include the \$25 million.

Commissioner JOHNSON. Your affiliates have doubled in this period. The number of hours you have put on have roughly doubled. It is just very difficult for me to conclude from these figures that you are on a down hill slide.

Mr. GOLDENSON. In order to be completely competitive, in order for us to try to get affiliates in the marketplace, we have to have competitive programming, we have to have competitive news and public affairs, we have to have competitive sports, and we have to have competitive daytime.

If Life Magazine is not getting into Boston and is not getting into Chicago, and it is trying to compete with Look, it is not going to make much profit when it has to make up all of its profits around the other cities without Chicago [231] and Boston in competition with Look Magazine. It is just as simple as that.

Commissioner JOHNSON. If there is only room in the mail box for two or three magazines, I don't see what Life's merger with some other AT&T is going to contribute to their circulation in Boston?

Mr. GOLDENSON. Except that this commission said there should be a third competitive network and so did the Congress. In 1952 the Congress said there was a duopoly of networks and there should be a third competitive network.

We came into this picture to create a third competitive network, which we have been attempting to do. I think we have done a reasonable job, despite the fact that we have not had equal facilities in the market place.

Commissioner JOHNSON. That is precisely my point. You referred to Stage 67, this African series you are talking about, you have increased by ten fold the amount of money you are putting into news and public affairs, you have increased your revenues six fold.

It would seem to me that you are doing pretty well.

Mr. GOLDENSON. Yes, but if your ratings should fall off at night, Mr. Johnson, as it did last season, and all of a sudden our stock drops to 30 from 60 or 58 whatever it was——

Commissioner JOHNSON. If I were in your position it [232] would make me mighty nervous.

Mr. GOLDENSON. It is not that. It is the fact that your own board of directors and your stockholders say to pull in your horns, what about your property? What are you going to do? You pull in your horns as far as news and public affairs and you start cutting down on a service to the public. I don't think the public interest is being served under those circumstances. Whereas, by this merger, I say we can plan for a long range period without cutting down and serve the public interest better.

Commissioner JOHNSON. Why is it that IT & T is going to be less interested in making money than your present direc-

tors? I think Mr. Goldenson that Mr. Geneen properly operates with an extraordinary reputation in the American business community today as a result of his profit orientation.

Fortune in July said his sole interest was simply in making money and that he had done very well at it. We all stand in some envy. But this still raises the question as to why is it if your directors find it unprofitable to invest money in news and public affairs that Mr. Geneen, whose interest is simply in making money, is going to find it more advantageous to increase this debt operation than your present management?

Mr. GOLDENSON. In answer to that, it is the [233] same thing that happened when I went to our own board of directors on increasing our budget on the news. If we are ever going to be a competitive network, we have to invest money before we start to make money. By investing the kind of money we are investing in news, eventually this will pay off, even though this may be three or four years from now, because we will improve the UHF's in the marketplace, we will improve our affiliates in the market place, and eventually we will be a competitive network.

Then it will pay off. You cannot always invest money and hope to have it pay off overnight. You have to do it on a long range basis. That is why I say this merger is worth while from the public interest standpoint. You can plan and make the investment, even though you may lose money temporarily, but eventually you are going to profit by it and the public will certainly profit by it.

Commissioner JOHNSON. Is it your desire to be number two?

Mr. GOLDENSON. No. Number 1. I will never be satisfied with less. If anyone at the head of ABC is ever satisfied with less, they better get themselves a new man.

Commissioner JOHNSON. Are you familiar with Avis rent a car?

Mr. GOLDENSON. Never heard of it.

Commissioner JOHNSON. Mr. Geneen is, I gather.

Do you think that there is nothing to be gained in [234] the public interest from someone who is struggling a little bit in the broadcasting business?

In what way would your programming be better if you were more secure and more financially sound, and less concerned about the vagaries of the market place?

Mr. GOLDENSON. We might take more chances in programming from time to time, whereas we might have to be more conservative if we don't have the protection against those vagaries.

Commissioner JOHNSON. How do you take account of the fact that it was ABC that took the lead with Stage 67?

Mr. GOLDENSON. Because we felt that by making that investment—we went to our board of directors and said:

This is a loss item, we know it is a loss item, the same as the news, but if we are going to build the stature of ABC we feel this investment must be made.

These are the kinds of things I say we can do as far as ITT is concerned and to a greater extent.

Commissioner JOHNSON. How do you account for the phenomenon of CBS? NBC sales last year were over \$2 billion a year, and yours were \$476 million. The combination of RCA and NBC apparently has not resulted in producing number one figures in all categories.

You yourself in your statement quote from the CBS annual reports, which notes their leadership in many of the measurable aspects of broadcasting. Why it is that if this does not work for NBC it will work for ABC?

[235] Mr. GOLDENSON. In the case of CBS, and I think it is equally true of NBC, they started in radio 25 or 30 years ago, and established relationships with radio stations. Those same affiliates moved over to CBS and NBC when radio moved over to television, and these associations have been established over that period of time.

You will find in the market place generally speaking the first stations in were channels 2, 3, 4, 5 and 6. ABC came along later as the third network, and we inherited some times channels 13, 12 and 10, that do not get out as far, and in some instances had to take UHF and where in the one or two stations market we came in, we came in at 12 o'clock midnight or four o'clock on Sunday afternoon, when we were supposed to

come in between 7:30 and 11 at night, prime time, because we brought those programs in on a delayed basis.

As to news and public affairs we can't get in there at all, because they will never take news on a delayed basis.

That is why we have a great handicap against us in news, because we never can get in on a delayed basis. So through all these years, CBS and NBC were able to build news because they had basic affiliates of 185 while we had starting with 20 and now finally up to 137, building against the odds.

So it is an unfair comparison. If you have an outlet in all of these markets to establish your news, and news is a habit factor—Huntley-Brinkley, and Cronkite have been [236] habit factors—when we made our decision to go into news, we had to build a new, young news team, and that is gradually being built.

Today I think competitively we have as good a news team as CBS and NBC; it will take a little longer to establish them because of the habit factor, but eventually they will be competitive. In the meantime, somebody has to foot the bill.

Commissioner JOHNSON. Let me pursue another issue with you. President Marcos of the Philippines was here this last week and spoke at the Press Club here in Washington Friday. Did you cover that speech?

Mr. GOLDENSON. Yes. I think we covered him the whole time since he has been here.

Commissioner JOHNSON. Did you carry that speech live on your network?

Mr. GOLDENSON. That I don't know. I am advised we did not.

Commissioner JOHNSON. What would have gone into your judgment as to whether or not to have carried that speech live?

Mr. GOLDENSON. That would be determined by the head of our news, Elmer Lower. He is a newsman. He will determine whether that is news worthy as compared with anything else that happens to be on the air at that time, and that decision would be his decision.

If that would be opposed by the network, then, in turn, it would come up to Sy Siegel to determine whether this should [237] or should not. If they can't agree, then it would come

to me. But generally speaking we have an autonomous operation within our company that the news department is autonomous and they objectively determine what is news worthy and what is not.

Commissioner Cox. When you say the network, do you mean Mr. Moore?

Mr. GOLDENSON. Mr. Moore.

Commissioner JOHNSON. But it was your judgment within the network that this was not, for whatever reason, news worthy to carry as a live matter?

Mr GOLDENSON. It was probably carried on our six o'clock news and 11 o'clock news and news during the day, so that excerpts of it were carried if the whole thing was not carried.

That does not mean that the portions were not carried. The highlights were.

Commissioner JOHNSON. Do you happen to know how much coverage you gave on Peter Jennings?

Mr. GOLDENSON. No, I do not.

Commissioner JOHNSON. And you did not carry him, as I recall, on your Sunday afternoon shows yesterday?

Mr. GOLDENSON. I don't know who we had on yesterday, on Issues and Answers, or New York, or what not. I can't answer that. They had me working yesterday afternoon and I don't know.

Commissioner JOHNSON. I concede I did not watch the shows [238] myself, Mr. Goldenson.

Your news judgments in this instance was shared by CBS. They likewise felt it was not worth while opting network time to broadcast the speech live of a head of state here in Washington at the Press Club.

Indeed, the only time that has been done to my knowledge, certainly as a regular matter, was when Khrushchev was last here. Likewise, they did not carry this on their Sunday afternoon discussion show.

I note, however, that NBC did both. NBC carried the speech live from the Press Club. NBC carried President Marcos on Meet the Press Sunday afternoon.

I also note that RCA has very substantial interest in the Philippines in communications as a common carrier. Is it con-



ceivable that this would have affected in any way the news judgment of NBC?

Mr. GOLDENSON. I don't know. We happen to have interests in two television stations, a minority position, in the Philippines.

Commissioner JOHNSON. I trust it is not as substantial as the interest of RCA?

Mr. GOLDENSON. Apparently it did not affect the judgment of our news department because apparently they elected not to carry it. That is the way it would operate as far as we are concerned.

[239] I cannot speak for RCA or NBC.

Commissioner JOHNSON. But you find nothing peculiar in the fact that CBS gave this basically very little coverage, if any, on its evening news, you chose not to carry it at all, the Washington Post carried the speech on page 9 in a relatively small item, and yet NBC provided the network time for the speech and also put Marcos on Meet the Press.

Mr. GOLDENSON. Whether our people made overtures to Marcos to be on Issues and Answers, I don't know. They may have made overtures. NBC may have gotten him on Meet the Press and since they covered it, our people may have chosen to take somebody who would make greater news.

On Issues and Answers we try to get somebody who will hit the headlines and on Monday morning as a result of that program on Sunday afternoon. If they had Marcos, maybe we had somebody else. I don't know.

Commissioner JOHNSON. NBC did not do too well by that standard, either, judging by this morning's paper.

Mr. GOLDENSON. That I can't answer.

Commissioner JOHNSON. Your Mr. McKenna mentioned this morning that he rather assumed that Broadcasting Magazine thought the merger was a good idea, that Television Magazine thought it would, too, and when questioned by Commissioners Bartley and Cox as to their interest in this observation Mr. McKenna concluded they also have parent company responsibilities.

[240] I am frank to say, Mr. Goldenson, it is just extraordinary difficult for me to comprehend how you propose to

represent that ABC will act as if it were totally disconnected from ITT in the course of the preparation of its programming.

This just runs counter to what we all know about human affairs. This is not the kind of thing that you have to find in statements of company policy, that you don't issue orders to the struggling young executive, that you should not go out and make speeches against the interests of your corporation.

This is the kind of thing people pick up intuitively. And yet it would seem to me this would be a matter of some concern to you as someone in the broadcasting business, to want to create a situation in which you would have total autonomy in deciding what you were going to broadcast and what not.

Here you are joining up, or proposing to, with a corporation that earns sixty percent of its income from foreign sources. It earns roughly half of its income from domestic sources, from defense department and space efforts and yet I gather that you are representing and want the commission to accept simply on your declaration that these facts would never have any influence whatever on you or your news department, or any producer connected with your company, in selecting what to program or what not to program, how to [241] play a story, whether you are going to put Marcos on or not. That somehow this is going to be totally independent. You are obviously very experienced in the broadcasting business, and I am equally obviously not.

But I must say it strikes counter to all I know about human nature to expect that that would be the case.

Mr. GOLDENSON. Mr. Johnson, may I say this, that we will inform the ITT board, I am sure Mr. Geneen will, and at the beginning of the season say we spend roughly \$140 million for our entertainment programs, and say we spend approximately this \$30 million this coming year for our news, and approximately \$24 million for our sports—this is an overall budget for 1967.

Within the confines of that budget, our board does not tell us, and we have an outside board, what programs to program on our network.

They as business people, are not really in a business to tell you what to program. This is based upon the creative thinking

of the people who are running a network and people who are acquainted with it.

Mr. Geneen is a very able person. He is not going to try to creatively run a network. It is impossible. Therefore, all I say is within the past year on a budget, we know what we can spend on a budget, and our budget people working with a program board, will decide what the programs are.

[242] It is just as simple as that.

As far as news is concerned, I have talked to Mr. Geneen, and he in turn to his board. They understand the integrity of our news department. They understand that as far as we are concerned that integrity will be protected.

If it were anything less than that, we might as well go out of business. That integrity is going to be maintained and if it is not going to be maintained, you might as well go out of business. That is the best protection in the public interest.

Commissioner JOHNSON. I gather—I don't really find that quite responsive to the question.

Mr. GOLDENSON. I hoped it was. If it is not, can you tell me where I was not responsive?

Commissioner JOHNSON. Basically, what you are saying is you don't think Mr. Geneen is going to take a hand in broadcasting, where I refer you to a quote in the magazine where it says, "If it came to the point where I felt I had better judgment than they did, I might take control of the broadcasting operations", from Fortune Magazine, and—but let's assume that Mr. Geneen stays out of it entirely.

Do you, sitting on the board of directors of ITT really need to be told that you should not advance an attack through a public affairs documentary on some matter that reg [243] is of great importance to ITT?

You don't need to be told that. That is not the kind of thing we—where Mr. Geneen has to take you aside and explain to you "Please Mr. Goldenson, you know you don't want to put on a public affairs programming that will be embarrassing to us in our relations with these foreign countries or in our relations with the defense contracting".

Mr. GOLDENSON. In response to that I have discussed this at length with Mr. Geneen. As far as the delegation of authority

in this area, he will be kept informed at all times of anything of importance, as will our board of directors, which is made up of a majority of outside directors, just as we now have, and I think it will function on that basis, on a very sound basis. I don't know anything about the thing you are quoting from, but insofar as my understanding with Mr. Geneen is concerned it will operate in the way I outlined to you, which I think is a very sound way for any business to function.

Commissioner JOHNSON. Again, here there is simply a problem of internal inconsistency, which is not really your problem, I appreciate, but I don't quite see how you can argue that ABC on the one hand will be autonomous and on the other hand ITT will take complete responsibility for it as a licensee to see that it lives up to its public interest responsibilities.

[244] On the one hand you will sit on the ITT board, Mr. Geneen will sit on your board, you will consult on all major matters and besides that, you are going to have a day to day working relationship with these people, obviously.

Again, it seems just in the nature of human affairs. I am simply left with the question of what does autonomy mean and is it really relevant?

Mr. GOLDENSON. It is relevant.

Commissioner LOEVINGER. Do you think autonomy might mean independence to act as variously the departments of defense, the space administration, and the Federal Communications Commission have acted with respect to Communications Satellites?

Mr. GOLDENSON. I would suppose.

Commissioner JOHNSON. I trust we are not multiplying that phenomenon with this action.

Commissioner COX. We are not answerable to somebody who eventually has to total up the projects, either.

Commissioner LOEVINGER. Somebody sets our budget.

Mr. GOLDENSON. As was said this morning, two members of ITT sit on our board, four members of the ABC board sit on the ITT board, at all times I will keep Mr. Geneen informed as to the things that are going on in the company.

In the last analysis, after our board has passed on anything, if the ITT board, or Mr. Geneen, in his judgment, thinks it

ought to be brought to the attention of the ITT [245] board, they still always would reserve that right. I don't think that will happen because we do have an outside board of directors, they are outstanding businessmen, and I would think generally speaking the ITT board would be governed by their judgment.

But in the last analysis they reserve the right at all times to change that in case they decide in the public interest it should be changed. That is the way it should be.

[246] Commissioner JOHNSON. Do you know of any instance in your experience where ABC in its news and public affairs programming has taken a position that was directly contrary to the interests of a substantial shareholder or director on the Board?

Mr. GOLDENSON. I know of cases, yes, where they have. I do.

Commissioner JOHNSON. Would you care to cite one?

Mr. GOLDENSON. Yes. In the case of Nixon, which Howard K. Smith did. Howard K. Smith elected to do the life of Nixon, which was based on a book, and the various elements that made Nixon. One of them was the Hiss investigation.

Howard K. Smith invited all of the Congressional people who were involved in his life, as well as Hiss and everybody else, to come onto his program, to do this study on Nixon. When the announcement was made on the Hiss situation, as far as the public is concerned, we had an outcry, and we had several members of our Board say that they felt it shouldn't be done.

Mr. Haggerty at that time was in charge of our news, and I asked Mr. Haggerty, "Have you analyzed this thoroughly and are you satisfied in your own judgment that this presentation is purely objective, that both sides are presented, and that the public will be able to determine this on an objective basis?"

He said, "I have been over it thoroughly, and I have examined the script. In my own judgment it is done on an [247] objective basis." I said to Mr. Haggerty, "You go right ahead. Nobody is going to interfere with you."

I had calls from stockholders. I had calls—I can't tell you from how many people. That program went on the air, because

Mr. Haggerty, in charge of that news, said that that was an objective presentation.

Commissioner Cox. Is that still on the air?

Mr. GOLDENSON. It was on "Issues and Answers," I think.

Commissioner Cox. He had a night-time program series which is no longer on the air.

Mr. GOLDENSON. That is right.

Commissioner JOHNSON. I commend you for your courage in putting on a program involving Mr. Nixon, but that doesn't really direct itself to the issue of whether or not there have been any instances in which the network has programmed, in a public affairs program, programs directed against some substantial economic interest, which is what we are really talking about here. I presume that there will be matters of opinion.

Mr. GOLDENSON. I beg your pardon. We have had cases where our News Department have come out with questions as far as cigarettes are concerned, an economic pressure very well may have been brought upon people on our network. But the integrity of that News Department was maintained, and that has been true of many people.

Commissioner JOHNSON. Did you do a documentary on the [248] impact of cigarette smoking?

Mr. GOLDENSON. I don't know what area it was.

Commissioner JOHNSON. Do you have members of your Board who are with tobacco companies?

Mr. GOLDENSON. No. But you were talking about economics and I am trying to direct myself to that.

Commissioner JOHNSON. I am talking about instances in which your network, or NBC, if you can think of where NBC has ever done one, which has attacked the strong position of RCA—it would make the point.

Mr. GOLDENSON. I have given you some.

Commissioner JOHNSON. You have not given me any instance in which a broadcaster has attacked a position of economic strength of a director or an officer of the corporation or another subsidiary in a holding company, as would be the RCA-NBC case.

Mr. GOLDENSON. My own judgment as far as our own outside Board of Directors is, they know what the policy is with

respect to our News Department and they agree with that, and as a consequence, even though in the one instance I mentioned, where they brought it to my attention, they thought perhaps this was something that should not be done—they have elected to follow that policy because it is a sound policy.

For that reason, we have never had any problem as far as our own Board of Directors is concerned, and I think that that [249] will continue to be so, because I think that the ITT Board is made up of men of comparable stature, and public service minded. I think that that will equally be true of their Board as well as our own Board, which is made up of a majority of outside members.

Commissioner JOHNSON. But offhand, you can think of no instance in your experience in which any network has taken a documentary position opposed to the economic interests of the enterprise owning the network?

Mr. GOLDENSON. Offhand, I don't. There may be, but offhand, I don't recall.

Commissioner JOHNSON. Thank you.

Commissioner BARTLEY. That reminded me of several questions, but there is one question, just to get your philosophy about mergers and the relationship between media of communication and industrial concerns.

Would you see any problem raised, say, if after you once get into ITT, then you merge on a mutually financially agreeable basis with Dow-Jones?

Mr. GOLDENSON. I am not quite sure of the question. I am not quite sure I understand the point.

Commissioner BARTLEY. I am trying to find out what your philosophy is, and the reporter can read the question. I am kind of interested in knowing what I said, too.

(The record was read by the reporter.)

Mr. GOLDENSON. Mr. Bartley, I don't know what the philosophy [250] of ITT will be in that respect. I think Mr. Geneen would be in a better position to judge that, because after the merger it would be the overall ITT Board that would establish this policy, so I think I would have to have him answer that question.



Commissioner BARTLEY. If you don't get into ITT, would you see any philosophical reason why you shouldn't, in ABC?

Mr. GOLDENSON. If it would serve the best interest of ABC and if it didn't violate any rules of the FCC or the Department of Justice, I would see nothing wrong with it.

Commissioner BARTLEY. That is a better question after all. Thank you.

The CHAIRMAN. Are there any other questions?

Commissioner Cox. Mr. Goldenson, we were discussing your commendable drive to displace whoever is Number 1 now. It seemed to me you are concentrating when you talk about your increasing programming effort in the news and public affairs field; is that right?

Mr. GOLDENSON. Not only it involves that, but it does involve a planning on your night-time, too, because when you plan an ABC Stage 67 and you know that you are plowing new fields because it does have somewhat of a class appeal and may not get sponsor support, as you know, we have gone into it this fall with probably only two-thirds sold.

So you can't plan more than one such thing as that, and you have to sort of wait and see what happens on it, whereas, [251] perhaps you can plan much more long-range programming if you are part of a complex that can absorb these buffers during a period that you are building. So it not only applies to news and public affairs, but it would apply to programming both day and night.

Commissioner Cox. Then you are projecting an interim period here at least in which you would expect as a result of this merger to engage in program activities which would produce at least a short-range net loss or reduction in profit?

Mr. GOLDENSON. On the Stage 67?

Commissioner Cox. And your news.

Mr. GOLDENSON. Oh, yes. We are fully cognizant of that.

Commissioner Cox. Well, now, I think that you made the statement if you are going to be a competitive network, you have to invest your money, and you have to invest your money in something like Stage 67. Isn't that true whether the merger is approved or not?

Mr. GOLDENSON. Yes, except that if you do run into a problem of night-time ratings falling off, and, therefore, your revenue doesn't come in, you are going to have to curtail your output immediately because the money is going to have to come from somewhere, as you can well be aware; whereas, if you have a wider base, you can plan this on a longer range standpoint even though this thing may happen temporarily. You can plan long range irrespective, and I think in the public interest, the [252] public interest is better served by long-range planning.

Commissioner Cox. If your night-time ratings fall off, it will not be because of inadequacy of affiliates, because you will have the same affiliates you now have. It will not, I gather, be because you were unable to spend as much money as NBC or CBS, because you say you spend as much. It will mean that in the judgment of the audience, you didn't pick the programs that they liked best.

Mr. GOLDENSON. That is right. But I will tell you, and I think you and I have discussed this at times, we are put to a little tougher test than CBS or NBC. We have to do better in the markets where we compete with NBC and CBS, and I think there are roughly 80 markets where we compete. We have to do better than they do in order to overcome the deficiency in the other markets where we don't get in.

So we are put to a much tougher test than NBC and CBS. I say that is a hardship that you shouldn't put on our shoulders if you are trying to create three competitive networks. It is unfair.

Commissioner Cox. I have been concerned with a number of things over the years.

Mr. GOLDENSON. You did a great job of trying to help us.

Commissioner Cox. Still, I don't see how getting money from ITT is going to solve that.

Mr. GOLDENSON. Except on your long-range planning.

[253] Commissioner Cox. We have been over that. I originally started out to ask that, so I will try to get back to it. You are contemplating that you are going to become more competitive in the news and public affairs features. It is my general im-

pression that at one time CBS enjoyed a pre-eminence in this field, and that they were overtaken and passed perhaps by NBC.

Now, to your knowledge, did this lead to any substantial shifting of affiliation from CBS to NBC?

Mr. GOLDENSON. Yes, there were shifts.

Commissioner Cox. Substantially?

Mr. GOLDENSON. I don't think substantially, but there have been some shifts. Basically, between CBS and NBC, they have these old-line affiliations going back 25 and 30 years, but there have been, at times when CBS went down at one period, shifts.

Commissioner WADSWORTH. Did it come back?

Mr. GOLDENSON. I don't know, but there was a shift that took place.

Commissioner Cox. I think in answer to one of Commissioner Johnson's questions you said that if you had greater backing, you might take more chances. Is it your judgment that CBS and NBC are now taking more chances program-wise than ABC?

Mr. GOLDENSON. I don't know if they have to take more chances, because we have to take more chances in order to do better than they do. I think we probably have to take more [254] chances, and I think we always have. I think in the industry we have been known as the experimenter in trying new things. We have had to try new things in order to get higher ratings in the 80 markets where we do compete and I think we have tried harder.

Commissioner Cox. Am I to deduce from that that if you get to absolute parity, nobody will take chances?

Mr. GOLDENSON. That doesn't mean CBS and NBC don't try. They are trying all of the time, but I think that we have to even do more.

Commissioner Cox. But I take it, on their basis of security, their efforts are pretty much in the realm of the tried and true.

Mr. GOLDENSON. When you say "tried and true", I don't know. They may not agree with that.

Commissioner Cox. You indicated that you believe you now have as good a news team as CBS and NBC, although it may take a little time to gain public acceptance. If this is so, what

are you going to spend added money for in the news and public affairs field?

Mr. GOLDENSON. Conversion to color.

Commissioner Cox. I am talking about news and public affairs, as distinguished from pure facilities.

Mr. GOLDENSON. Well, apart from facilities, converting to color in itself is quite expensive. As you know, you have to [255] bring in color film from Vietnam, and you have to develop developing plants that develop it on the plane coming in, and you have to have all kinds of additional expense.

The footage, of course, on color is four times as expensive as black and white, and sometimes five times as expensive. You have to have more takes than you do in black and white, and you have so many additional costs of producing these things in color that we are not sure when we are saying it is going to cost \$30 million that we will be able to bring it in for that.

Commissioner Cox. Am I right, then, in assuming that your main emphasis here is not on expansion of your news-gathering staff, that you are satisfied with that, but that this is largely connected with the cost of gathering and presenting this news in color?

Mr. GOLDENSON. I think that is primary. I think that is right. I think I said as to the \$40 million. in 1968 that will be because of the much more elaborate coverage of primaries, of conventions, and of elections, all of which will be done in color. That will be increased from roughly \$5 million as it was in the last convention year to \$10 million that year.

In addition, we intend to build certain additional staffs in depth. I think we are staffed now fairly well with top people. I think there may be certain staffs that we will have to staff in depth. How much of that will be done, I can't answer at the moment.

[256] Commissioner Cox. Do you recall when you and your Board of Directors projected this \$40 million figure for 1968?

Mr. GOLDENSON. As to the \$40 million figure, we have not presented that to our Board. This is only in our own projection. What I said was when we originally projected to our Board, when we were spending \$3½ million to \$4 million, we would have to bring it up to \$25 million.

We only budget a year in advance to our Board. We will tell our Board toward the end of this year what our budget will be for 1967, which will be approximately \$30 million.

Commissioner Cox. But you are talking already in terms of your expected expenditures in 1968?

Mr. GOLDENSON. Yes.

Commissioner Cox. And you were making these kinds of plans without the merger?

Mr. GOLDENSON. We made these because we wanted Mr. Geneen to know and so that he would be in accord with what we had in mind as to the expenditures on our news and public affairs for 1968.

Commissioner Cox. Do you anticipate that this expanded and improved news and public affairs program service, while it will probably still continue to be a net loss operation, will recover for you a higher percentage of those costs than you are now getting?

Mr. GOLDENSON. In time we think that will be true; yes.

[257] Commissioner Cox. In other words, you think while it will also serve the public, this is a step in the best interest of ABC and its stockholders?

Mr. GOLDENSON. Yes, as well as the public.

Commissioner Cox. And it is a good business investment?

Mr. GOLDENSON. Yes.

Commissioner Cox. Do you think the color changes are good business investments?

Mr. GOLDENSON. We do.

Commissioner Cox. Do you think the projected studio complexes will be good income-producing investments?

Mr. GOLDENSON. Right. We couldn't serve the public unless we did all of these things.

Commissioner Cox. That is what I kept coming back to. In other words, you have to serve the public. You would have to serve the public with or without approval of the merger. I think that service to the public would involve much these same plans.

Mr. GOLDENSON. Except that we couldn't maintain them, programs.

Commissioner Cox. Perhaps.

Mr. GOLDENSON. That is it. We possibly couldn't maintain them. This is why I say long-range. When you are planning, you have to plan sufficiently far in advance to maintain that momentum. But if you have to curtail because your earnings fall off, I think you are doing a disservice not only to your public [258] but you are doing a disservice to the network and to the News Department.

[261] Commissioner Cox. Would you think it likely that ABC will step up its purchases from ITT where the items it needs are available from the latter?

Mr. GOLDENSON. If they are competitive and if they make a quality product. This would have to be determined by our engineering staff, because we wouldn't want to suffer by comparison.

[273] In the last analysis, as I said before, we are still going to be dependent on UHF because we are the last one in. CBS and NBC have built these loyalties that I don't think we can shake to any great extent.

As a consequence, we are going to have to build the strongest network possible to help the UHF stations in their markets force conversion of those TV antennas towards a UHF set.

[274] Commissioner Cox. But the lengthening of your line-ups, then, depends upon the development of additional UHF stations.

Mr. GOLDENSON. Yes.

Commissioner Cox. And that, in turn, will depend upon the decision of some entrepreneur in each of these markets that the all-channel set saturation, the growth of the market, the cost of other programming—all of these factors have reached a point where he thinks it is a reasonable venture for him to go into UHF television?

Mr. GOLDENSON. Yes. And also that our programming is that strong that in the marketplace the people will be forced to change their antennas to get the UHF reception because the programming that we are delivering is exciting enough that they want to take that additional step, in addition to the fact that they already have the UHF on their new sets.



We still don't get as wide a coverage as we do on VHF, Mr. Cox, as you well know.

Commissioner Cox. Address that to Commissioner Lee. He is in charge of that department.

Commissioner LEE. I think Red Quinlan would dispute you on that.

Commissioner Cox. He probably does.

There has been some talk about the research and technical assistance that you could get from ITT. What sort of assistance [275] would you expect this to produce?

Mr. GOLDENSON. I think that knowing the problems that we have with UHF and the problems that we have of getting into the marketplace—we are the only company that is not in the manufacturing business or really don't have a research organization. CBS has their laboratories, and, of course, NBC has RCA.

I can visualize our going to ITT and telling them some of our problems in the marketplace and our problem of reaching on a comparable basis the public with the limited facilities we have as compared with CBS and NBC, and what steps can they take in the way of creative research to come forward with equipment that will meet this problem to put us on a comparable basis.

I will tell you right now I will be breathing down Mr. Geneen's neck all the time, just as I have been breathing down this Commission's neck to get the drop-ins.

Commissioner Cox. There are a couple of questions there. First, as Commissioner Bartley suggests, I take it that anything developed by RCA's Labs or CBS's labs would be commercially available to ABC.

Mr. GOLDENSON. But they don't have the impulse. RCA doesn't have the impulse because as far as NBC is concerned they have 204 affiliates, most of which are VHF, and CBS has close to 200, most of which are VHF, so there is not the compulsion on [276] them that there is on us.

Commissioner Cox. You are narrowing on something, then, that would be research on the part of ITT to help you with your particular problem of inadequacy of facilities?

Mr. GOLDENSON. Right, which would help the public and help the industry generally. It won't only help ABC but it will help the affiliates and the people in the UHF field.

[277] Commissioner Cox. This would be in the area of new antennas.

Mr. GOLDENSON. I don't know. I am the kind of man who doesn't even know where you put the gasoline in the car, so I am not in a position to really answer that question.

Commissioner BARTLEY. I'll bet you know there is a tiger involved in it.

Mr. GOLDENSON. Mr. Geneen is quite familiar in this field, and I would rather you address the question to him, because I am just not mechanically minded.

Commissioner Cox. That makes two of us.

Commissioner LOEVINGER. I guess no one knows what the research is going to produce.

Commissioner BARTLEY. I thought he was talking about applied research, but I am curious as to what disadvantage you have been to in competition with NBC or CBS as a result of this, or in the case of NBC, their affiliation with RCA.

Mr. GOLDENSON. I am not so sure we would have such a receptive ear if we went to RCA to help us in markets where we would be in competition with RCA, whereas, if we went to ITT we could say we had problems and could you develop something to help us.

\* \* \* \*

[283] Commissioner Cox. I think it also indicates that their revenues from Government contracts are \$465 million out of that figure of \$2 billion 57 million.

Mr. GOLDENSON. Yes.

Commissioner Cox. It says here it is "U.S. Government contracts," which would be about on the order of that, or a little larger than that. Suppose an effort is made in Congress to cut the military budget, with particular emphasis on the types of equipment which it is purchasing from ITT.

Isn't it possible that ABC would be less free to comment or its comments would be viewed by the informed public with greater suspicion if the merger were approved than if it had no corporate ties to a military contractor?

Mr. GOLDENSON. Insofar as I can see, I suppose you are referring to our news and public affairs department, are you, Mr. Cox?

Commissioner Cox. Yes.

Mr. GOLDENSON. Insofar as we are concerned, within the ABC Division, our News Department has a delegation of [284] responsibility for objectively determining what news and public affairs goes on the air. I tried to indicate before to Mr. Johnson that we protect that integrity, and we discussed this with Mr. Geneen and his Board of Directors as well as our own Board of Directors and it is recognized that this is the only proper way that you can run a News Department and maintain the integrity of a sound News Department.

If you did otherwise, you couldn't compete with NBC and CBS.

[285] Commissioner Cox. I think it should be made clear that no one is suggesting that this situation would lead to the presentation of any informational programming that was knowingly and intentionally false. The problem that some of us see is that human nature being what it is, and people being perhaps more fearful in some situations than they need be, that the people making the initial choices as to what is to be presented despite all of these very desirable policy positions that you have taken to isolate them from exposure, cannot really be completely isolated, and that the involvement of the network with an even broader group of financial interests widens the directions from which restraint may be felt by the people involved in these decisions.

Do I make myself clear?

Mr. GOLDENSON. I understand it very fully, and my only answer to that is, Mr. Cox, that if our news department were to operate on any other basis than a purely objective basis in competition with NBC and CBS where they are also operated on an objective basis we would suffer competitively in the eyes of the public and in the entire eye of the news field.

I say that we will maintain and protect that integrity based on my own statement to Mr. Geneen and his agreeing with me on that, and his board of directors and their support of that, just as our board has supported that integrity.

We intend to maintain that.

[286] Commissioner Cox. If, of course, CBS whether compelled by an improved competitive position for you if this merger is approved or for any other reason decides to merge with General Motors, IBM or another large defense contractor, we might conceivably find a situation in which, when that issue arises, you would be at no competitive disadvantage with your broadcast opposite numbers because you all had a like interest.

Mr. GOLDENSON. In my judgment, if that were to be true your electronic journalism would go down the stream. In my opinion, the only way you can operate a news department and a public affairs department, is to put the person objectively in charge to make those news judgments irrespective of anything.

I think, knowing CBS as I do, and as I am sure you do, and NBC as I do and I am sure you do, they operate on that basis and will continue to be operated on that basis, and we will continue operating on that basis to be competitive, and we will maintain the same integrity which we continue to have and I see no deviation from that possible.

\* \* \* \* \*

[313] Commissioner JOHNSON. Suggestion has been made that one of the great public benefits to come from this merger will be that research and development capabilities of ITT will be available to ABC, and for the life of me, I cannot really comprehend the basis of this argument, or understand why it is that this is going to make more technology available than would otherwise be available.

Quite the contrary, it would seem to me to tend to dry up [314] ITT's incentive, just as you have said it has the impact on RCA.

There is one minor thing I wanted to pursue with you.

Mr. GOLDENSON. I didn't say it dried up the impact on RCA. RCA has been the leader in color television and the leader in a lot of things in the broadcasting field.

I say if we went to them with a UHF program, I am not sure I would get much excitement on their part. I think you misunderstood me. If it is going to help us in competition with them maybe where they have a "V", I was kidding a little bit, on the square.

\* \* \* \* \*

[316] Commissioner JOHNSON. Let me pursue, if I may, the question of the impact of this proposed merger on a potential

fourth network. Is it your position that this proposed merger would either have no detrimental impact on a fourth network or possibly improve the opportunities for a fourth network?

Mr. GOLDENSON. I think it will improve them because I think we are going to help UHF. The fourth network that comes along is going to benefit by any improvements in UHF.

[318] Commissioner JOHNSON. So the answer is in fact it will be more difficult for a fourth network?

Mr. GOLDENSON. Not a bit, because you will have established the UHF conversion of the homes. What you are trying to reach is the homes. If you don't convert those antennas in those homes so that there is a possibility of people receiving the signal, what good is it to have a UHF station? If we force conversion of the sets in those homes, then the field is wide open for three, four, or five UHF's to come into the market and then we have forced the conversion.

Commissioner BARTLEY. Congress had a little to do with that, too.

Mr. GOLDENSON. Yes, but Congress can't force that conversion unless there is programming for those UHF stations. They are not going to transfer for who shot the goose as far as that antenna is concerned. They are only going to convert if we have the NCAA football games and somebody will convert the antennas to get the games on the UHF.

[319] Commissioner JOHNSON. Wouldn't you rather have some UHF stations than other UHF stations in a given market?

Mr. GOLDENSON. We would rather have the one that has the best local management every time, whoever that may be.

Commissioner JOHNSON. And wouldn't you be in a better position——

Mr. GOLDENSON. And we would much rather have, than a UHF a VHF because we get out wider.

Commissioner JOHNSON. Wouldn't you be in a better position to get the VHF if it is available and to get the better management of the UHF if available and competing with the resources of ITT behind you?

Mr. GOLDENSON. The answer is yes.

Commissioner JOHNSON. To that extent, wouldn't it be more difficult for a fourth network to get those stations?

Mr. GOLDENSON. I think it is the obligation of the Commission to try to establish a competitive third network.

Commissioner JOHNSON. I don't think that answers my question.

To the extent that the resources of ITT will enable you to compete more effectively for the VHF when available, or the best managed UHF when it is not available, to that extent wouldn't it make it more difficult for a fourth network to do so?

Mr. GOLDENSON. The answer is no, because in the UHF area [320] we will force the conversion.

Commissioner JOHNSON. You still have not addressed yourself to my question.

Mr. GOLDENSON. I have answered that question very clearly. Every time we take good programs into a UHF market and a UHF station, we force the conversion on the house, and when that happens three or four other UHF stations can come along and then they get the advantage of the fact that those antennas have already been converted.

Commissioner JOHNSON. I understood that.

Mr. GOLDENSON. Therefore, we have driven a wedge. We have been the backfield that has given a wedge for the fullback, namely, the second UHF, to come along and be able to compete with us with our affiliate.

\* \* \* \* \*

[326] Commissioner LOEVINGER. Maybe I can clarify this fourth network thing. Do I understand your position correctly to be that a fourth network is more likely to have a chance to arise if there are more television stations in the major markets? Is that correct?

Mr. GOLDENSON. That is right.

Commissioner LOEVINGER. And the only possibility of there being more televisions in the major markets is if the UHF portion of the spectrum is opened up. Is that correct?

Mr. GOLDENSON. That is right.

Commissioner LOEVINGER. And you think that if ABC is permitted to go through with its projected plans, that this will open up the UHF portion of the spectrum in the major markets and therefore present the opportunity for a fourth network?

\* \* \* \* \*

#### TESTIMONY OF HAROLD S. GENEEN

[329] Mr. GENEEN. I would be glad to answer the question



on reciprocity. We have a definite position and definite policy. We don't have any use for it, we don't believe in it. We have a firm policy against it and it is known throughout the company. From a competitive standpoint we don't feel we need it. The detailed information you are asking as to what possible [330] advertisers from ABC we can obtain for you but I do not have it. I am not even sure that it would be even obtainable, as we don't keep that information.

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#### TESTIMONY OF LEONARD H. GOLDENSON

[331] The CHAIRMAN. Have you many questions, Mr. Cox?  
Commissioner Cox. Not too many.

You answered Commissioner Johnson that the commitment you had as to money was based on your discussion with Mr. Geneen of your plans for expansion.

Mr. GOLDENSON. For improvements and expansion of our news, sports, and so on.

Commissioner Cox. Those are your plans with or without the merger?

Mr. GOLDENSON. No. My answer to that is, and that was the point I was making before to Mr. Johnson, that these are our plans, but if our ratings fall off or any condition should arise that we are not throwing off the kinds of money at nighttime or daytime so that we can afford to pick up the losses that are going to be developed as a result of these expenditures, we would have to cut off in our news and public affairs. By reason of my discussion with Mr. Geneen and his statement that he supports this budget irrespective of what our losses or nighttime ratings may be, we plan to go ahead with this on a three-year basis.

Commissioner Cox. Did you cut your news and public affairs [332] programs last year?

Mr. GOLDENSON. We held it to what it was doing. We did not advance it. As I say, this will accelerate our advancements. That held us back at the same rate we were going. Our budget remained the same for two years in a row.

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#### TESTIMONY OF RAYMOND SAULNIER

[348] Commissioner Cox. You seem to suggest that the very size of ABC's revenues in relation to the revenues from these

product lines broken down by line and by country, makes it clear that ITT would do nothing to hazard the revenues from ABC.

Dr. SAULNIER. I think it very unlikely that it would.

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TESTIMONY OF HAROLD S. GENEEN

[484] Commissioner BARTLEY. Now we can start back at the top and go down through Canada and find out what these are. Are they similar companies to those in the United States?

Mr. GENEEN. In most cases their sales operations are very small, manufacturing operations, which we maintain up there. They are similar to the U.S. and it is a duty problem over the Canadian border.

Barton Instruments is the activity in Canada for the Barton Company in Los Angeles; Canada Electric the same; General Controls the same. ITT Canada, Limited, is actually a manufacturing operation we have in Canada. It does a combination of, you might say, civil work in the sense of transmission going to the C&R Railroad, and so on, and some Canadian Government work.

Royal Electric is, again, a branch of the U.S. branch, and Wakefield Lighting the same.

Jamaica is a small manufacturing company that we started there about two years ago manufacturing PABX equipment, telephone equipment, for the local company.

Do you want me to continue down there?

[485] ITT Mexico—I will have a little trouble sorting them out because they keep changing—

Commissioner BARTLEY. You can understand why I am having some trouble.

Mr. GENEEN. Yes, I understand. I know what our operations are there. Our primary operation is a manufacturing company that makes telephone equipment.

Then we have two commercial operations, one of which makes controls and some types of heat exchangers. Basically, that is our business. They have these set into various entities down there and I can't offhand separate them for you properly. But there is nothing significant in size.

Commissioner BARTLEY. You have told me in general.

Mr. GENEEN. Yes.

Standard Electric of Panama, I believe, is just a local sales company.

ITT Caribbean Manufacturing Company makes telephone equipment for the Puerto Rico Telephone Company. It is a wholly island enterprise in which we manufacture and use local labor and sell to the local telephone company.

ITT Caribbean Sales and Service is a sales operation operating all through the Caribbean selling our equipment, whether manufactured in the U.S. or Europe.

Commissioner BARTLEY. Don't you operate the telephone company?

[486] Mr. GENEEN. In Puerto Rico, yes. That will appear under telephone companies, in the second column near the bottom. Do you want me to read those?

Puerto Rican Telephone Company, San Juan; and in the Virgin Islands, Virgin Islands Telephone Company.

Now we go into South America.

Argentina is a manufacturing company on telephone equipment.

In Brazil it is a manufacturing company in Rio which manufactures both telephone equipment, transmission equipment, and also is in the consumer goods, TV and radio.

Commissioner BARTLEY. Consumer goods? That is the first time I heard that.

Mr. GENEEN. We have some foreign, not very much. We have some consumer services in the U.S. primarily.

Commissioner BARTLEY. What products?

Mr. GENEEN. TV and radio, and some hi-fi, that type of equipment; not a sizable volume.

Commissioner BARTLEY. It is in Europe, isn't it?

Mr. GENEEN. Yes, it will be in Europe. About \$8 million, I guess, would be my guess down there.

In Chile, the electric company there makes telephone equipment.

In Colombia, Standard Electric is a sales operation.

Ecuador is again a sales operation.

[487] El Salvador is a sales operation.

Venezuela is a sales operation.

You have to incorporate in each of these countries.

Commissioner BARTLEY. Let's go back to Chile for a second. That is telephone manufacturing?

Mr. GENEEN. Yes. It is manufacturing. We have a telephone operating company in Chile. It appears at the end of the South American operations.

After Venezuela, which is also a sales company, we now come to the telephone operations. The first one is in Brazil and the second one is Chile.

Commissioner BARTLEY. And the ownership proportion in those, please?

Mr. GENEEN. In Brazil we own the stock 100 percent. The Rio Grande property, of approximately \$7 million value, is in a long, drawn-out seizure and compensation case that we have with them. The property, the other property we have, is approximately \$7 million value, we are now negotiating to sell.

In Chile, 93 percent was the figure this morning that we own. It operates all over Chile, with very fine relationships and no problems.

In Peru, this is a company mostly in Lima. I think 62 percent is our ownership. We have had a long series of discussions about rates and things which we have not clarified, but which appear to be coming to a culmination after about two years [488] of negotiations.

Commissioner BARTLEY. Do you terminate a cable there?

Mr. GENEEN. Not in Peru. I think we have international communications there in AC&R.

Well, I am told one leg of it is operating. It is pretty old if it is the one I am thinking of. It is mostly radio.

Now we will move into Europe.

In Algeria, that is a small company making manufacturing equipment in Algeria. We have had lots of problems there. It is practically nonoperative at the moment.

In Austria, this is our Austrian manufacturing company that supplies telephone equipment to the local telephone company. All the telephone ownerships are called Postal Telephone. They also make a few controls and some intercoms. Most of the telephone companies abroad are owned by the government. This is particularly true all through Europe.

Belgium is the Bell Telephone Manufacturing Company. This manufactures telephone equipment for the local PTT, also transmission, also data processing, also a variety of com-

ponents, electronic-type components, also some consumer goods.

Commissioner BARTLEY. A completely irrelevant question, but why is it Bell?

Mr. GENEEN. This is an interesting question. Let me answer it without taking more than a second.

In 1927 ITT bought all the offshore companies of the Western [489] Electric Company. There was some decision to divert from American Tel at that time and that is how ITT got started.

I might just add this because I think it is helpful to your thinking and consideration:

We became a fairly large company abroad although almost 100 percent owned by Americans. In order to go international, we had to come back to the United States, just the reverse. That is what we have been doing for the last four years. I think you have background in the telephone field. You can understand why some of our telephone operations overseas manufacturing telephone equipment might be a little difficult to establish on a large scale here.

[490] Commissioner BARTLEY. By reason of the agreements, the contracts and so forth, I presume. Is that the basis?

Mr. GENEEN. I don't want to take this Commission in to wrong areas, but I think you are aware of the fact, although we have been talking about a great many things here for the last day, that basically the Western Electric Company is, for a lot of technical and other reasons, practically the largest majority supplier to the ATT. This is 82 percent of the market. Then we have General Tel, United Utilities and so on. So it is a rather small but not unimportant market here.

This is one of the reasons we have chosen to depart from our traditional fields and become international, as I put it, and coming to the U.S.

Commissioner BARTLEY. Do you manufacture mobile equipment?

Mr. GENEEN. We manufacture mobile equipment in Denmark——

Commissioner BARTLEY. We are getting there, then. Okay.

Mr. GENEEN. You are talking about mobile telephone equipment?

Commissioner BARTLEY. Yes.

Mr. GENEEN. Denmark, Germany and the U.K.

Commissioner BARTLEY. But not in the United States?

Mr. GENEEN. We did, and we went out of the line.

Going on down, ITT Europe, Inc., this is our Brussels headquarters which has to be incorporated separately for legal reasons.

[491] ITT Standard is a sales operation that operates in several countries in Europe selling mostly semi-conductors and components.

I will not try to pronounce these names.

In Denmark, that is our manufacturing company in Denmark that makes mobile radio and also supplies the telephone company in Denmark.

Our Finnish company supplies the telephone company there.

In France, Cannon Electric is a small plant, again an extension of our Cannon Electric Company in Los Angeles which makes connectors largely for the defense end use.

CFRO/SEDRE is another data processing operation much like the one we have in Paramus.

CGCT is one of our two important manufacturing companies in France which manufactures telephone equipment for the French PTT.

The next one is a small teleprinter company sales organization.

Commissioner BARTLEY. You are not the sole supplier, are you?

Mr. GENEEN. Not in France, no.

The next one is Metro, an instrument company that manufactures electronic measuring instruments on the Swiss side of France.

International Standard Electric is a branch of our Ace High that we spoke of before.

[492] LCT is our major laboratory in France. This is a fairly sizeable lab and does joint, you might say, research and development for all the companies over there, particularly in the communications field.



Commissioner BARTLEY. Do they have French government contracts?

Mr. GENEEN. It has some primarily in the military field. The bulk of their contracts are all paid for with our own money and are what you call commercial research in the tele-communication field. It is a very good lab.

LMT is the other of our large manufacturing—well, I skipped one.

The Materiel Technique Industrial is a small relay company manufacturing electrical relays outside of Paris.

LMT is our other major telephone manufacturing company in France supplying telephone equipment for PTT.

Oceanic Radio is a consumer goods company making TV's and radios, approximately \$8,000,000.

SPI is a holding company, nothing operating in it, and the same would go for the next one, I would take it.

In Germany, the ITT Industries in Germany must include our semi-conductors. The first one there, Commissioner, is our holding company in Germany that operates in the semi-conductor field, also making integrated circuits. Curiously enough, I might add something of interest, to our knowledge this is the [493] first company that has developed really good veractors that will tune UHF at all levels and scales. This is something we are attempting to move along with.

I don't think you ever have a lead of more than two months in this business.

Commissioner BARTLEY. Commissioner Lee has been studying French all this time. I anticipate he will start studying German right away.

Mr. GENEEN. We have hopes for it. We haven't done enough for it.

SEL is our biggest Germany company and they manufacture telephone equipment for the PTT, PABX's they make teleprinters. They also make transmission equipment, avionics, and they have a line of electronic components, and they are in the TV and radio field. This would be our largest entry in that field, about \$60,000,000 a year in Germany, with some export though mostly Germany.

Commissioner BARTLEY. That is, the sets are sold mostly in Germany?

Mr. GENEEN. Yes. I would guess their exports would be less than 10 percent.

Commissioner BARTLEY. You are no longer in the consumer research business in the United States?

Mr. GENEEN. No, we are not.

Commissioner BARTLEY. Do you have any restraints or [494] restrictions against that?

Mr. GENEEN. Only self-imposed. We have no particular desire to move into it.

The next companies are Greek companies, small manufacturing, very small.

Standard Electric Iran is a small operating company in Iran.

The next company is our Italian Manufacturing Company in Italy which manufactures telephone equipment for the government, transmission equipment, and they also make a line of components that we sell to industry.

The next company is construction and installation company which specializes in installing outside plants for telephone companies, largely in Italy but also all over the world. They do a lot of contract business.

ITT Domel is a liquidating company that was in the consumers business.

In Netherlands, the first one is a join-up operation in which we own 70 percent, and American Meter owns 30 percent in which we are exploiting the line of natural gas meters and valves and things in the new gas fields that are developing in Europe.

The next one is our Dutch Company which manufactures telephone equipment and transmission for the Dutch government, also manufactures a few commercial operations, mostly in the [495] railroad signaling line.

In Nigeria it is a limited sales company, primarily.

In Norway, this is our manufacturing company in Norway. They manufacture telephone equipment for the government. They also manufacture wire and cable, and they are in a small way in the consumer goods field.

In Portugal——

Commissioner BARTLEY. Again on consumer goods, what types?

Mr. GENEEN. Their volume wouldn't be a million dollars a year, I don't think, if that was your question.

Commissioner BARTLEY. I wanted to know what types.

Mr. GENEEN. TV and radio.

Commissioner BARTLEY. When you say consumer goods, is that all?

Mr. GENEEN. You correct me and you are right. In Norway we sell about two or three million dollars worth of freezers.

Commissioner BARTLEY. In Norway?

Mr. GENEEN. Don't ask me why we sell freezers in Norway. It is a somewhat isolated market and local and they do a good job on it. They also want to expand it and we have been holding them down. That is why they are successful.

Commissioner BARTLEY. You don't operate in Alaska yet?

Mr. GENEEN. No.

Standard Electricia is our Portuguese company, manufacturing [496] telephone equipment for the government, but they also manufacture radio equipment for industry at large. They have done a few NATO subcontracts for various companies in Europe.

Republic of South Africa is our manufacturing company down there which is primarily in components and transmissions, with some cable.

In Rhodesia this is a small company in Rhodesia which makes radios. Incidentally, it is entirely colored, top to bottom, the whole manufacturing operation.

In Spain, this is our——

Commissioner LEE. You mean colored people?

Mr. GENEEN. Yes.

I can't quite figure the first two in Spain, but they are a couple of our holding companies, I take it. One of them, I know, rents transmission equipment mostly to the Spanish fishing fleet. That is the second from the top. The first one I don't recognize—well, no, the first one and the third one are all parts of our telephone operation in Spain which manufactures tele-

phone equipment, transmission, some components, some TV components, cathode ray tubes and so on.

Commissioner BARTLEY. Historically, you had a very good telephone company there at one time.

Mr. GENEEN. Yes, we did, and we sold it back shortly after the war, and they are now our principal customer. Somedays we finance them and some days they finance us.

[497] ITT Norden is a small distributing outfit for TV and radio in Sweden.

Our Switzerland company manufactures telephone equipment, transmission, for the telephone company, some components, particularly compacitors and a few items of that type. They have recently gotten into a few instruments that go into the paper field.

So that is the list coming down there.

No, there is more Europe.

Standard Telephone and Radio in Zurich is the telephone company with two subsidiaries, Muller-Barbieri, which is the instrument company I mentioned, and Steiner, which is a small company that rents TV sets all over Switzerland.

United Kingdom, Great Britain, Cannon Electric is a branch of the California company, a manufacturing company. Creed and Company's principal product is teleprinters, largely sold to government.

ITT Industries, Limited is a holding company that, again, containing some of the off-shoots of our controls company in Los Angeles.

Standard Telephones and Cables is our major company there that makes telephone equipment and transmissions for the government, also exports around the world. It also makes components, electric components. In radio it makes a line of commercial radio. It has a very good field in Avionics. It is in the TV and radio field in a reasonable way, about \$20 million, [498] I would guess, annual volume.

The STL Laboratories is one of our other major European laboratories, the other being in France.

Zambia is just a small off-shoot of the Rhodesian Radio Assembly Company.

Then we move to Australia. I think we talked about Cannon Electric. This is basically a sales operation.

Standard Telephones and Cables in Sidney is our main telephone manufacturing operation which manufactures telephone equipment, telephones and transmissions, for the local government there, and also makes a series of products including transistors and stuff which is sold to industry.

In Hong Kong, this is a small operation which assembles TV's, though mostly radios right now, for resale into the United States and Europe. Most of their U.S. brands would be through Zenith, which they are a subcontractor to.

Far East Limited is just the holding company for the group there.

Transelectronics—maybe I have mixed the holding companies up. I believe Transelectronics is the one with the radio assembly line in Hong Kong and the other is the holding company.

In India, that is a sales operation.

ITT Far East and Pacific is in Japan and is basically a management and sales office.

In New Zealand, we have a cable operation.

[499] In Philippines, we have the Globe-Mackay Cable and Radio in Manila, and the ITT Philippines, a small manufacturing and sales group.

Then we come to the International Communications.

American Cable and Radio, this is All American Cables, Commercial Cable, the Globe-Mackay Cable, ITT All America Communications in the Caribbean, ITT Cable and Radio, Puerto Rico, ITT Communications, Inc., Virgin Islands, ITT World Communications Press Wireless.

Then our communications facility in Brasil a high frequency operation, the same in Bolivia, the same in Buenos Aires and in Chile, and the Cuban American Telephone and Telegraph, which is owned 50 percent by American Tel and Tel and 50 percent by ourselves, which still operates now and then.

And then Radio Corporation of Cuba. As I understand, we operate on practically a C.O.D. basis.

That is operations and manufacturing.

Now moving into another area where we have a pretty strong financial group, we have our Alexander Hamilton Life Insurance Company in Denver; American Universal Life Insurance in St. Louis; Hamilton Management Corporation, Denver; our ISE Finance Holdings in Luxembourg, which we use to finance long-term customers; ITT Avis, Inc., mentioned yesterday; ITT Financial Services, a group holding company for some of these same [500] financial companies, which includes Great International Life Insurance in which we own 50 percent, and Georgia Life Insurance holds the other 50 percent, operating overseas, mostly in Holland.

ITT Aetna Finance is a finance company spread throughout the Midwest.

Those are the companies that we operate. I think they have listed here some minor participations which we have in other companies. The Cable Company in Australia, the LTT Cable Company in France, and in Italy it is a transmission-engineering systems group, basically. And in Japan, Nippon Electric and Sumitomo, two of their large companies in which we have participation. They were originally Western Electric plants.

And in Spain, this is just a minority participation.

Commissioner Cox. Have you any idea, Mr. Geneen, how many separate corporations are involved in all of this structure?

Mr. GENEEN. Well, what is listed here, from a quick look, probably looks like about 80, but every year I have to answer that question from Mr. Gilbert as to how many fees we pay out and I think I tell them we have 380 boards throughout the company. I don't see them all.

Commissioner Cox. That is 300 separate corporation boards of directors?

Mr. GENEEN. Yes. A lot of them are legal entities that really met in the lawyers' office, I am sure.

\* \* \* \* \*

[502] Commissioner BARTLEY. I can't quite put my finger on it, but I think it starts at the bottom of Page 18 there. Here is another question. Was that first company, the telegraph company, the 122 year old company, that you spoke about?

Mr. GENEEN. I don't know what the 120 year old company is. It was not a telephone company, and in fact it was a com-



pany we acquired four years ago, called MacLaren Controls in England. I guess we acquired a heritage with it.

Commissioner BARTLEY. I was trying to get it down to the figures. Telegraph was in business before telephones.

I say ITT has been able to develop the fullest benefit [503] of these invaluable resources, and primarily due to the development of a management system designed to meet the needs of a large diversified corporation of international scope.

What would be the difference in management controls over the ABC division or whatever the name of the new one is going to be, and the other entities?

Mr. GENEEN. Mr. Commissioner, in a meaningful area, it won't be a lot different in certain respects as to details. Let me see if I can elaborate on that for a moment because I think it goes to the heart of some of the questions you may have in mind. Because we are a large and decentralized corporation, we have to operate with highly autonomous managements. This is the theory on which you can keep vitality in an organization this big and this wide-spread.

This means that the local managements have to have the ability to make the day to day operating decisions and they have to develop their own problems and solve them.

They make their short-term and long-term planning. They have to keep us informed. Now if I reverse this, I say that as the central headquarters, we have to keep informed, and we have to see that we are informed. But beyond that, we more or less agree on basic policies and basic programs, and subject to changes which come along which are discussed.

They operate with complete autonomy, and this is the only way you can operate. As a mechanical approach, once a year we [504] usually sit down with all of these people and look at their programs for the following year, and their requirements for funds and so on, and we agree basically, and within that they operate with complete autonomy.

The central headquarters does a few other things. It coordinates research and development so we don't duplicate these things, and it provides services.

We have experienced staff people in various separate areas, whom, if it is a manufacturing company and so on, we would send out if they needed.

It has some central processing, data processing, which we make available, and other skills of this type. It does one other thing which I think is quite important to our conversations here. It supplies funds, and it does a lot of the overall banking for the system in order to bring the resources to the individual companies and support them.

If I can make a comment, I think one of our most important and responsible activities is to enable and support the companies into taking you might say forward plans and I won't call them "risks," but aggressive competitive actions which they themselves might even hesitate to take.

I think your own experience has been that we are more apt to suggest and support companies into this type of movement going forward than the companies themselves. This comes from the background of your own resources which we can bring to help.

[505] Now, I think that gives you a pretty good idea of how we would normally operate with a company. They report up, in the case of most of our divisions to one of our four or five executive vice presidents, or basically on to me. We have some group vice presidents in between.

Now, in the case of ABC, the same kind of autonomy is completely harmonious with the way you would run a regular major company, with complete autonomy.

We have gone further to spell it out in some of the agreements and perhaps we have spelled it out in a way which has given you some concern, but the spirit and the intent is quite clear.

We have gone beyond that, because we recognize that the operating management has to make these decisions, and we in turn have a licensee responsibility if this is completed, and so we have provided for six members of the board of ABC to sit on the board of ITT and six members of ITT to sit on the board of ABC.

In addition to that, we have the experienced management which we have great confidence in of the ABC organization,

which is well-known to this Commission, on top of which we have the outside directors, of the ABC board well experienced in this field, and long experienced, and outstanding men of reputation and integrity, and I think that they are familiar with their responsibility.

[506] Our own Board has been apprised and the ABC Board say they are experts in the sense of the full knowledge that we will gain as we go along between us, but they are fully cognizant of that responsibility.

Now, our feeling is that there is completely harmonious, with an autonomous operation, and yet at the same time if for any reason there were any differences of opinion, it would have to be finally settled at the ITT Board, but it is quite clear with six members of the ABC Board on it and with the background of two sets of outside directors, of outstanding ability, you have a most responsive and direct route directly from the responsibilities of the broadcasting end right up to the top of ITT.

I have enlarged a little on your question, because I expected this was an area you were after.

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[507] Commissioner BARTLEY. Let us narrow it a little bit and apply it to your statement, in the proxy statement which reads: "With the aid of ITT technical experience, and financial resources and experience overseas, management is of the opinion that ABC's operations can be competitively strengthened and profitability expanded," that is a part of the sentence. It is the last one on page 5.

Mr. GENEEN. Do you want me to give a broad scale answer to that, Commissioner, or try to define what this means?

Commissioner BARTLEY. I am frank to say we haven't yet discovered what it is yet, and perhaps you can tell us that.

Mr. GENEEN. Let us start in, because that is what I was asking, whether you wanted a broad opinion of our interest and basis of why we think that this is a solid economic step and one in the public interest.

As we see the broadcasting field, and particularly ABC's position, number one, this is a field which we think has a great future and which we think we can make a significant contribution.

I will come back to the details of that in a minute. At the same time, I think it is one where it is quite evident that the element of competition, if it can be brought to some kind of a parity, would be both helpful from the standpoint of the listener and the public interest and would be beneficial to our stockholders.

If I look at the ABC network, which I think the figures [508] are on record, Mr. Goldenson has given those, for approximately \$200 million or \$300 million in revenues, we have a loss. So there must be some element or opportunity for a competitive improvement.

Now, our thinking ran along the line that competition is not one facet or another. I say that because in listening yesterday it seemed that a lot of the things got partitioned out.

Mr. Goldenson has made the point that to be fully competitive network, he has to have competitive programming. In the exchange of letters, that we had on March 18, he mentioned in the exhibit there without putting any figures against it, the things he would need in the way of facilities, as he saw that, in addition to the requirements for programming, in order to get on a competitive basis for color conversion.

So you might say the first two factors encompass a competitive program and a competitive signal. This is the equipment.

Then there is a third factor that is important here and that is the question, if you are going to be competitive for outlets and otherwise, is a confidence factor. I think Mr. Goldenson has referred to this, from the standpoint of stability of long-range planning, and some of the pressures he receives, and this is more or less in the area of financial support.

Commissioner BARTLEY. And continuity of management.  
[509] Mr. GENEEN. Yes, and continuity of management.

Now, with these three things, as we see it, you would have a first-rate product—competitive programming, competitive signal, and confidence.

I personally—and I interpose this without mentioning any name if I am allowed to do that—know one individual that is a licensee of this Commission who even if he can be shown, which he can't, that by changing his affiliation he would pick up 50 percent more coverage because of the closely densed and packed

competitive signals he is getting from his own network, and yet his hesitation is based on one thing, and he has expressed this to me, and I know him personally, "I am just not sure that this is going to stay this way, that they are going to stay competitive."

There is the habit factor there, but I wanted to point out in my limited experience and exposure that this confidence factor is an important point.

So there are these three points.

Then as has been said and so we say, and have made the commitment, in our exchange of letters that we intend to support ABC into becoming a fully competitive network. Some of the details and programming requirements have not been spelled out, and Mr. Goldenson has made some comment on those yesterday, and the equipment requirements were spelled out in the exchange of letters in the July 25 letters.

[510] I think there were about \$124 million worth of studio and other conversion equipment.

That leaves the last factor, and that is access to viewers which has come up again for conversation yesterday, and it is clear that if you have these first three elements of a completely competitive product, it will gain you something in these areas right off the bat. Perhaps you will gain affiliates and perhaps you will get more hours on shared stations, and perhaps as we brought out, the desire to get programs will hasten the conversion to UHF sets.

So basically these are areas which we would hope to be moving down.

Now, the comment seems to be coming up as I heard yesterday, how can you benefit from a company that is making a loss, and by pouring more money into it and I think there was some comment about the public service area. I don't think that we made our decision in terms of a short-term requirement.

We figure this is an area that can stand competition and we are good at competition. It is an area that we are willing to support and finance and bring to a parity of competition.

I don't know how we will get all of our viewer coverage and this is something that we are going to have to work on, through the evolution of UHF conversions and other things ahead of us.

But coming back to the principal, you say how can we help? [511] Well, I think that is pointed out, how we see our financial help bearing into the logic of this merger.

Now the technical area, which I said I would address myself to, is this: Here it is not feasible for us to say that at this particular time we have all kinds of things on the shelf.

I mentioned one small thing that comes up out of our other areas, in the technical area that can aid ABC. But we do have some 15,000 engineers around the world, a lot of them in the United States, and we have done a tremendous amount of work in the field of high frequency, and radio, and this type of area, which is basic to our business, and I would guess that in any particular year, current year, we are spending somewhere between \$25 million to \$30 million on these kind of areas. This is high frequency and radio.

I am not a technical man. In the areas which would impinge on the problems of the broadcasting industry, be they transmission, or reception, or better components, and so on.

Commissioner BARTLEY. Are a lot of these under Government contract?

Mr. GENEEN. None of these, this is all private research that I am talking about, this is our money.

Now, with the addition of \$2 million or \$3 million or \$5 million a year as an increment to apply, and I think that you used the word about applied yesterday, to apply this already [512] running momentum which we are using in another field, to the broadcast field, we think that we will have brought into the field in total a major force in addition to those that are already working on the improvement and development of broadcast equipment.

Now, you can say, well, so what? What does this lead to? I can't tell you what it leads to yet because we have to do it but this is what we are in effect planning to do.

Now I can say that as Mr. Goldenson said yesterday, CBS has a laboratory, and NBC has RCA, and as I look back over the history, color television came out of these two areas.

You had a competition for color television at that time, and it is rather interesting that both of these companies were the sources of this type of equipment. There are some people today



that even think that the old CBS system was a pretty good system.

Commissioner BARTLEY. I think Farnsworth had a little something to do with it, too.

Mr. GENEEN. Yes, but you say, what will we invent? I can tell you. But I guess what I am saying is out of this background, we are working in three dimensional projections now for Avionics, and we work in a lot of miniature areas.

I asked some of the people the other day, what does the broadcast industry need? And they came up with such items as a miniaturized color camera that you can carry around instead of [513] a truck. And some kind of method of getting color pictures over telephone wires.

As a matter of fact, we have a system we called Developed Videx which will take black and white picture over wires.

Finally, we get down to some of the things that we would like to see if we can do to hasten UHF conversion which I had in mind with this tuner which would be a click tuner. Let me make a point. I am not a technical man and I am not unaware of the tremendous amount of work that the Commission does on all of these technical areas including UHF, so I make no promises other than I say as apart from that, these things which we might be able to do dovetailing with ABC's requirement in this field of looking for viewers, and hastening UHF conversion and the ability to supply trained technicians for the various things they may need from time to time, are all areas which we think we can support them in.

If we are fortunate with our R&D, we may come up with another breakthrough which will be good not only for ABC and ourselves, but also good for the industry.

That is what we think we can contribute.

Commissioner BARTLEY. This, I gather, is because it would become then a part of the ITT family, and these activities you wouldn't engage in otherwise?

Mr. GENEEN. Well, I have to give a fair answer to that, Mr. Commissioner. At this point we have never considered this a [514] particularly interesting market to us. We do a little bit of this work around the world. But primarily, if I look at

the situation here, I would say to a degree it is a business more or less in smaller company hands, with two exceptions, and I would wonder whether it was a good business for us to try to penetrate at this particular moment.

But on the other hand, I don't think that our interest if we were in this would be solely limited to the commercial aspects of the market. I think there was some question raised yesterday about why anybody wouldn't do it either way. There are a lot of industries that we can go into that we might think are better.

But if we have an incentive as part of this overall commitment we take on, to make this a fully competitive network, let me say that this is not only a sound objective for us and one that is good for the industry and the public service but it is also one that will be good for shareholders as well as the industry.

So I have no problem in linking that thinking up in my mind, and I have no problem in saying in the absence of such incentive I am not sure that you might say the marketplace statistics warrant our going into the field.

Commissioner BARTLEY. There was one other question I had.

The next paragraph, the following paragraph there, I will have to get myself straightened out here—another element [515] of that was experience overseas, and then on page 20 of the Annual Report now, the second full paragraph there under the ITT management system, autonomous managements act to meet local problems and so on.

"At the same time," and I think this gets to the overseas experience, "At the same time, they provide a sensitive reaction to world conditions, they are contributing information to the development of the area policies and ultimately through direct participation at ITT world headquarters for the rapid formation of world-wide management policy and decision."

Is that the kind of thing you had in mind?

Mr. GENEEN. No, let me separate the two paragraphs and answer them in turn.

The paragraph we have read here really is directed at knowledge of competitive actions. These are new models introduced

in the market and new companies awarding of contracts and so on.

Basically, let us say that we find one of our competitors came out with a more modern and cheaper model of transmission. This is a matter of world information from our standpoint, because we make it in a number of areas and we export all over the world.

This is what is meant by that.

In other words, this is a matter of, shall we say pulling together the knowledge of the marketplace, and applying it to all [516] overall business strategy.

The other thing where you are talking on page 5, the last proxy statement, we were merely alluding to the fact that with all of our operations overseas, we have no TV ownership overseas or here.

I think it was said that we have some very small CATV experimental operations which I can talk about if you want to, but we have no broadcasting of that type.

Now ABC does, and I think that they have already indicated what they were, a minority interest and they may continue. We were alluding to the fact that with our contacts and with government and elsewhere, and commercial people that we know, it is entirely possible that we may be able to help the increase of these if this is to be their policy.

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[518] Commissioner Cox. To dispose of one of the points that you touched on in response to Commissioner Bartley, you were discussing the technical contributions you thought you might be able to make to ABC as a result of your research facilities.

Are you telling us that you presently have projects underway in any of these facilities for the development of more effective methods of UHF transmission, so that you can find an appropriate solution to the problems of coverage, and the sort of thing that Dr. Saulnier was referring to?

Mr. GENEEN. Let me preface this by saying I am not a technical man, so my way of phrasing this is based on my inquiry into the subject.

[519] What we do have out of our continuing line of business, which as you have seen all over the world and particularly

heavily in Europe and to some extent here in South America, is a telephone communications responsibility from a product line standpoint.

This includes transmission of all kinds, submarine cables, microwaves, various megacycles as you would call them, and so on.

We work on antennas, and we are working on all kinds of things. Most of this work is directed at the moment, and I named a figure of \$25 million or \$30 million worth of this kind of allied work, which with the backgrounds of which would fit into the requirements of the broadcast field.

Now, that isn't directed at the broadcast field at the moment. That is directed primarily at our own product markets in the telephone field, serving the markets that we serve.

Now, my comment was that I thought that we could buy an increment, and I have checked this with our technical people and they agree, buy an increment of \$2 million or \$3 million or \$4 million a year, begin to take all of the residual value of that, which has been directed in one direction, and begin to apply it specifically in the area of the broadcast field.

Now, what they would recommend as their areas that they could upgrade or do the best on, I am not sure at this time. We are not spending sizable sums to broadcast applications of these [520] at the moment, and I could get some more information from our technical people, but I think you will find that they are working in all of the techniques that would apply in the broadcast field.

That is what I was trying to say, and I make the comment that if you put these two together, I can't say in the \$25 million as being converted to the broadcast area, but I would say the residual value of that work redirected by an increment expenditure might be worth some \$10 million or \$15 million a year of added force in the broadcast field, which is a sizeable development contribution. That is all our money, by the way.

[521] Commissioner Cox. Yesterday I was trying to evaluate Dr. Saulnier's conclusions, which turned in part upon this technological research contribution, and I asked him, at page 343 of the record:

And it is your understanding that ITT has underway some research or development which could be of assistance to ABC in solving its problem of lack of comparable access in these markets by improving the coverage of UHF stations?

And his answer was: "That is distinctly my impression."

Is his impression correct?

Mr. GENEEN. No, I think he is referring more to the receiving end and conversion area. I spoke of the fact that we have already developed what we believe, at least to our knowledge, are the first veracters that will tune the UHF bands just on a nonmechanical basis, just as you would on a regular tuner.

Commissioner Cox. This is one that snaps into position?

Mr. GENEEN. No. They have the veracters. I am sure that we are not the only people working on it, but we have the working veracters. This would be where you would just click right around and move from VHF to UHF, and so on. It is only one of the means of overcoming one of the problems a housewife might have with the tuning.

Commissioner Cox. This involves your entry into the [522] manufacture of receivers for sale in the United States or your persuading existing manufacturers that they should buy from you or take a license from you for the manufacture of these devices?

Mr. GENEEN. You are asking what he was referring to. Let me make it also clear, Mr. Chairman, if we have a proper product in this area, we would sell it into this field whether we had the merger or not, because this would be a volume product which would make sense, and we are in that field in Europe. We are also working on coaxial cables which would give you less loss lead-in at the household end.

We might well develop, out of what I suggest, if our applied research is gone through and we focus some of this on the broadcast area, we might come up with areas that might be important in this whole field. But we don't to my knowledge have any sizable expenditures going on at the present moment on directly changing signals or doing anything with the UHF. That would be something we would get into if we went forward.

Commissioner Cox. In your supplementary statement that you presented yesterday, you were pointing out that ITT does not manufacture, at least in this country, the kinds of equipment used as major elements in radio and television broadcasting, but if I understand what you are now saying, it would appear to me that your association with ABC and the realization of the problems it is having may stimulate you to [523] increased broadcast research.

If this is true, and if you develop end products which you think are competitive you would, then, go into the business of selling them in the United States?

Mr. GENEEN. We would offer them to anybody at the same price we offered them to ABC. Let me answer the rest of the question you pose there, Mr. Commissioner.

Yes, we would, and that is a commitment that we will.

Commissioner Cox. And this would mean, then, an increased capability to supply ABC's equipment needs?

Mr. GENEEN. Yes. But I think the key thing there is that we would have a tremendous incentive to help toward this very point you are talking about, improving the conversion as fast as we can of UHF, and so on, to get this coverage and access they need.

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[530] Commissioner Cox. You have referred to the generally autonomous character of the operation of many of your other subsidiaries. Do you have any of these which you have acquired recently where you have comparable provisions to those you have entered into here?

Mr. GENEEN. In the sense of outside Board members and so on?

Commissioner Cox. Yes, and the three-year term spelled out?

Mr. GENEEN. No, we do not. We have some internal boards and some boards with a few outside people on them, but we did this purposely. I might say we both agreed on this at the outset as a matter of both autonomy and discharging responsibilities. We had a little problem trying to get some of this language so everybody could understand it and work with it.

But we do not have that same kind of a set-up. This was done purposely because we feel a much higher degree of public



[531] trust responsibility and need to keep this autonomy more clear-cut in the case of ABC than we would with any other division we operate.

Commissioner Cox. Why?

Mr. GENEEN. Because of its public interest overtones.

Commissioner Cox. Would this, in its purest form, involve their responsibility in the field of news and public information?

Mr. GENEEN. I would like to make a simple statement on that, Mr. Commissioner. It came up several times yesterday.

Mr. Goldenson has made it very clear that the integrity of his news operation within ABC will not be challenged by anyone. I support that position 100 percent. That goes for everybody in any part of ITT.

Commissioner Cox. I think the suggestions that were made yesterday, or the questions that were raised, were more or less as to how you can, in fact, implement what we realize is a very sincere commitment; that is, how can you insure that the working man in the ABC News Department, or the man in charge of preparing documentaries, or deciding what subjects will be dealt with in documentaries, doesn't simply, on his own, say:

Well, now, I understand we are now a part of the ITT organization, and I am well enough informed to know that certain subjects impinge on interests of ITT and, therefore, just on my own judgment, and perhaps with some idea it will add to [532] my future advancement as I evaluate it, I am simply not going to put in a recommendation that we do a hard hitting documentary on this or that, but I am going to find something that will be just as interesting to the public and that they ought to know about. We just won't get into this.

I take it that there is a possibility injected into the news and public affairs operations of ABC by the merger of that kind which it would be really very hard for you to guard against. Wouldn't you agree?

Mr. GENEEN. Yes, I agree, and yet there is an element of this, Commissioner, which I think deserves some attention. The greatest disservice in the sense of a merged ITT-ABC company that anybody could do to our company would be to

violate that. I think there have been some comments about the size of ABC in relation to use, but it is beyond that.

This is a commitment. I think we can make that very well known, how we feel about that commitment, and I think this would do a lot to obviate the concern that you and some of the members of the Commission have expressed. But let me go a little further on that.

It has been my experience, in spite of the fact that it is easy to say that an internal policy bulletin can be disregarded and people with good intentions will get you in trouble. It can happen and I suppose it has.

Commissioner Cox. Mr. Cohn says if it happens, you lose [533] your license.

Mr. GENEEN. I heard him this morning. Maybe that is why I say that is the greatest disservice they could do us.

But coming back to the point, I have always found that if you create an environment in which this can work properly, it will. I come back now to your point about news. I am not a newsman in the real sense of the word, but the highest ingredient that a newsman has for sale is his professional integrity, and he is built that way, to be a newsman, and he resents any pressures coming any other way. This attacks the very fiber of the man.

If we create an environment where it is quite clear that we welcome even mistakes, preferable to any kind of subjection of his thinking, you are going to get what you want. Where you don't get it is where somebody writes a policy bulletin and doesn't intend to back it up. That is your difference.

Commissioner Cox. You will have to promote a couple of guys who make mistakes to make that stick.

Mr. GENEEN. We have done it.

Commissioner BARTLEY. I believe you indicated that you are aware that there is this possibility. I believe Mackay Radio became aware of it happening in Western Union offices and complained that employees were not following the quota in spite of all the instructions that Western Union had sent down the line time after time after time; isn't that right?

[534] That was before my time, Mr. Commissioner, but I am laughing a little bit because we have been around recently hol-

lering to see that they are now doing it in our favor. I understand fully.

Commissioner BARTLEY. This is a human nature thing there. An ABC employee owning ABC stock is more aware of ABC and much less aware of ITT than if his stock is transferred and made into ITT stock. He is just going to know more about ITT, isn't he?

Mr. GENEEN. I understand. But I made the point I did, and I think properly, that the degree of support that we give this whole policy, and I think you have heard me speak and you have heard Mr. Goldenson speak, with unequivocal determination, is what really makes the difference.

[536] Mr. GENEEN. That was part of it, but also the key part we are talking about here is the ability to support them in a competitive network position. I think if we are talking about our commitments to this, and this has come up, this is the key commitment we have made. You can evaluate it several ways, but it is to support them into being a competitive network.

Commissioner Cox. In other words, then, you had made some kind of a study of their competitive position before you made the approach?

Mr. GENEEN. Yes, we did.

Commissioner Cox. And this revealed, as I think has been pointed out perhaps too often in the record, that the basis of this problem is one of access to equal and competitive facilities?

[537] Mr. GENEEN. That is correct, Commissioner, and I would add only one thing: There isn't any short-time answer to the solution to that. In the absence of a short-term answer, then we felt what we are proposing here made a lot of sense in the public interest.

Commissioner Cox. In other words, that means, I take it, that even if your assurance of added support, although up to this point ABC has been able to finance increasing commitments for programming and for equipment—your added assurance of support for full conversion to color, for the eventual building sometime, and I don't know that it has been spelled out or what the time scale is, of these studio facilities, East and West, and for added programming, that if all of this is achieved short-

range you don't expect that, in and of itself, to make ABC a fully competitive third network?

Mr. GENEEN. No. As I described before, we feel—and I am not the expert in broadcasting but this is our appraisal—we feel that this will give ABC a fully competitive product, both in programming and in signal, and then I added the other factor which I think is highly important.

I gave the example that I did of the confidence that this will be continued, which is an essential element of the relationship with the affiliates. These will earn us, I would hope, some additional access, whether these are additional hours on shared stations, as I said, or transfers to affiliates.

[538] But in addition to that, we have the further long role ahead of speeding the conversion to UHF and all of the other factors where we may be able to bring some technical strength to bear to help continuously upgrade this thing so that finally you arrive at a viable, really competitive network. In our opinion, you have to have this competitive product to start down this road.

Commissioner Cox. Quite aside from the confidence factor, which surely is important, I think there is still one gap between the three factors I listed: that is, ABC may, with your assistance, become fully and more quickly converted to color, it may develop its more adequate and more attractive facilities, it may develop, although it says, as I am sure everyone agrees, that money is not the sole answer to quality in programming, but it may develop a stronger program line-up.

It will still, before it can really become competitive, even if everybody is sure you will keep this going year after year, they still have to overcome the rather small but in critical areas very important deficiency in coverage, and that involves either the development of more stations with wider coverage, or the effective conversion of more sets to receive UHF signals, and these are matters, in the question I was asking, which are going to take some years.

They involve judgments on the part of other independent businessmen as to when they should build stations. Once they [539] build them, I think, if there is no ABC affiliate in the area, they will be knocking on Mr. Goldenson's door, looking for the affiliation.

Then the problem you and he will have to work out is whether you are going to give them an affiliation or whether this impinges on the coverage area a little bit of an existing affiliate who may not be very happy about it. This is a problem you have not run into yet.

Mr. GENEEN. No, but I think I am aware of the import of what you are saying, Mr. Commissioner. We realize it will take an investment of time, money, and a lot of effort. I said at the very outset that we are a very competitive company, and we believe there are rewards on both the public interest side and our own by being constructively competitive in this situation.

I would pose a kind of a counter-question: We think it is the best, viable solution that can be obtained at this time, in making ABC a fully competitive network.

[540] Commissioner Cox. I must confess I don't have a better one to offer to you.

Mr. GENEEN. I really think that is what I was saying.

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[544] Commissioner Cox. You said yesterday in your supplemental statement, Mr. Geneen, that ABC is far more important than any of your other subsidiaries, and I assume this was designed to rebut a possible inference that you might seek to influence its programming to serve other ITT interests.

I wanted to know whether this is true in terms of profits. It obviously is true in terms of revenue, but would the profits that ABC, at least on its present level, would be paying into ITT loom as large in comparison with your other activities?

Mr. GENEEN. It would be the largest single profit entity in the company.

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[550] Commissioner JOHNSON. It is a part of our understanding.

It goes beyond sociological studies, Commissioner Loevinger, to a common household awareness, I think, that one does not question his superiors in that way if he can avoid it.

The other concern I think that is related is that there is a potential here for influence by management of ITT. This would be intentional, overt, directed toward ABC to produce a particular result.

You probably personify as well as anybody in America the qualities that we associated with successful and aggressive management administration in American business. You have demonstrated that here today, your attention to long-range planning, [551] your desire to associate yourself with the ablest people you can get your hands on, your desire and obvious capacity to be on top of any operation in which you are involved.

Throughout the presentation you have been really on the horns of a dilemma, it seems to me, in trying to say on the one hand, "We will assume responsibility as licensee for the quality of this operation, we will exchange membership on the boards, and I will keep on top of what is going on, major decisions will be reviewed by the ITT Board," and yet on the other hand, there will be something called autonomy on the part of ABC.

I think in large measure our problem has been one simply of interpreting what we mean by autonomy. It seems so obvious on the face of it that ABC will not be autonomous in the sense that is now autonomous of ITT as not really to require further analysis.

It would seem to me here you could take one of two positions, and I appreciate that you are well represented by one of the ablest lawyers in the business as to what positions you ought to be taking, and I don't mean to be directing you in this regard.

You could take essentially the position that he has taken, that this is a widespread phenomenon, there are many conglomerate companies in the broadcasting business, we certainly will be no worse than they are and, therefore, this ought to be approved.

Or, on the other hand, you could take the position of yes, [552] this is a potential danger, we do not think it is a very important danger, but we recognize it, and, frankly, all we can offer you is our assurance that, as ITT, we recognize the importance of independent sources of news and opinion, we recognize the business desirability of running this as an independent entity, and we give you our assurances we are going to do the best we can and that is about all we can say.

Either of those two courses, it would seem to me, would be more logically sound than trying to take the position that you



are going to be kind of involved but you are going to be kind of not involved, either, you are going to participate in review in some ways but you will not interfere with the news and opinion judgment.

I would like whatever comments you care to make in that general area, hoping you might clear this up.

Mr. GENEEN. Commissioner, there are two problems there as I see you have presented them, except that they do interweave.

Let me deal with the problem of autonomy first and then move to the hazard, as you put it.

Let me deal with a definition of autonomy, which I think goes to the heart of the problem when you raise it in that form.

Autonomy is a delegation of authority, generally within an agreed sphere of operating policy, and it works on a basis of continuous information and review, which means it is constantly updated as to the policies.

[553] Or if it doesn't work, it theoretically could be withdrawn. Autonomy, as it is often used, and I detected in some of the questions that were written out the word independence and that is a harder one to define—because you could have an autonomy which is completely beyond control and if you wished to it could result in, you might say, the privilege to be irresponsible. But this is not autonomy.

Autonomy is a controlled operation but within a framework which makes sense as I tried to describe it, in day-to-day operations, operating decisions, short- and long-range planning, agreement on overall policies, the need and duty to be informed both ways.

Within that concept I think it is perfectly sound to say that the ITT Board as the licensee has the ultimate responsibility to the Commission, and I think it is also sound to say that that Board will delegate an autonomy to ABC to operate its business practically speaking in the manner it has always operated it.

We have great confidence in both the management and its outside board. And as an insurance of this flow of information back and forth and the ability to get direct reactions, to sit on both of these boards. But I think this is additional assurance.

The real definition, if you are talking about autonomy as the one I just defined, is the ultimate responsibility in the [554] ITT Board, the delegation of authority within agreed policies, plans, and so forth, and the constant interplay of information which means that it will work or, if it did not work, it would immediately be subject to minor correction, or whatever adjustments or understandings would be.

I am not sure whether that answers the question of autonomy, because I think that is fairly logical and in conformity with all the other kinds of autonomous operations we run, except we have made the point, and I make no bones about this: We recognize that this is an unusually sensitive public interest, public trust area, so we have said in effect we do want an independent board, and we do want independent directors of stature who are independent of ITT, and who can raise their own warning flags, even as much as we might raise them, which we think is good.

We do want an experienced management. I think all these things are high pluses, over and above the basic situation that you might have if we had not done this, which would be a licensee who would, in turn, internally and without the framework we have laid out here, do exactly the same thing on a day-to-day delegation to some individual and who would operate in relation to that autonomy the same way.

That brings us to the interplay of the point you raised: Does this, you might say, increasing of the environment raise greater hazards for the integrity of the news, and, you might [555] say, unseen or inferential persuasions in any of the commercial and news areas.

As a matter of policy, I think both Mr. Goldenson and ourselves have said exactly what we mean. It is the greatest disservice that anyone can do in that company, to violate this relationship of complete integrity for the news.

You go beyond that and it is not just the policy you announce, but it is the policy you really enforce and have everybody know that you mean it.

The descriptions that were given earlier of how this might come about more or less well in the area of well meaning people who think they are helping the company. They would not be

helping the company. So the first problem is to make it clear to everybody that they are not helping the company.

One comment was made that maybe you have to make some demotions if this happens. It is always possible that something will happen, but it is usually your experience that if you act on it as a result it will happen a lot less.

So coming back to the question you raised as a businessman, how would I look at it, I would say yes, I have to say that there is always a possibility of anything. But I think if we follow this consistent line that we have laid out here, and mean it, and because we have so much at stake and because we have made a commitment, it will be very, very contingent that it would happen.

[556] That would be my answer as a businessman.

You refer to the parallels of other companies and everything. I am not a lawyer and I am in no position to say why or why that should not bear on your judgment. I am just giving you my answer which I think in practice will work. Remember, I said that if you create the environment in which people can do what they would naturally be inclined to do, namely carry out the integrity of their profession in the news, they will do it.

I think you practically have to go out of your way, inferentially or otherwise, to support a different attitude before that would really happen.

Commissioner JOHNSON. Basically, I guess, what concerns me is if you would be prepared almost to say "Yes, we recognize that there is a potential danger here," or "Yes, we recognize that as a result of my sitting on the ABC Board they are going to be fully aware of my own personal views, and as a result of their sitting on the ITT Board they are going to be fully aware of ITT's operations; yes, we recognize the subtle psychological pressures that are brought to bear.

"However, we believe that we have created a structure that is going to minimize those problems. We don't think as a result of that structure these problems are going to be very serious, and you have our personal commitment that we recognize them as problems and we are going to do our very best to minimize them."

[557] Then it would seem to me you are on more tenable ground than trying to steer a middle course and say it is not really going to be a problem in this company. It would seem to me that the answer is yes, it is a potential problem in any company like this, but you have made an effort to minimize it.

Would you be prepared to go that far?

Mr. GENEEN. Mr. Commissioner, I hope to convey that with what I did say, so let me just subscribe word for word with what you said plus one other thing: If it did happen, you can count on us to take action. I wouldn't have to take it. I know Mr. Goldenson would take it long before I even got there. But you are assured, double teamed, that that is the way it would go.

Commissioner JOHNSON. The next area that still gives us some problem, I think, in terms of a record, relates to the support that would be provided by ITT to ABC. The problem here, as I see it, is that we have a necessity of finding, as a Commission, that the public interest will be benefited by this merger.

That, it seems to me, logically requires us to find that but for the proposed merger ABC would not have financial resources available to it that, with the merger, it will have available.

That is to say your burden as I interpret it is not simply one of demonstrating that you will make financial resources [558] available to ABC. Your burden, as I interpret it, is one of demonstrating that you have committed resources to ABC that are in excess of the resources that would otherwise have been available to ABC but for the proposed merger.

So far, as of the time I spoke this morning, and as of this afternoon, there has still not been put into the record a specific commitment of dollar amount to specific purpose by ITT to ABC, and evidence from ABC, testimony from Mr. Goldenson, that this will constitute resources above and beyond those that would otherwise have been available to ABC.

If you and Mr. Goldenson are prepared to make such a statement now, it would seem to me it would immeasurably aid the present condition of this record.

At the present time, there is nothing in the record, absolutely nothing, that any Commissioner can point to that demonstrates.

that the public interest is better served, because there has been no specific commitment by ITT.

Mr. GENEEN. Commissioner, let me answer that in full and get to the commitment stage. Just to trace the background of the commitment from the standpoint of our company, in the March 18 letter—well, first, I will go back for a second. I want to get the full nature of our commitment on the record first and then we will get around to the financial measurement of it.

We have said that we will support ABC and Mr. Goldenson into becoming a fully competitive network. As I have said when [559] we were talking a little earlier, our idea of competition has to do with improved programming and more competitive programming, as he has put it; improved facilities, which I will call improved signal or competitive signal; finally, stability of continuity of this level of quality of product.

That is the real commitment.

In his letter of March 18, he laid out the requirements to become a competitive network in terms of words. There were no figures in that particular letter. This letter was approved by our Board as a basic commitment that we would make these funds available when they were needed by ABC.

In the July 25th letter, which was in response to the Commission's request for information, some of this was spelled out. Specifically, the increased cost of competitive programming, although talked about yesterday by Mr. Goldenson, was not spelled out in dollars.

[560] Mr. GENEEN. The increased cost of facilities were \$34,000,000 for color conversion equipment, \$90,000,000 for mobile and East and West Coast studio, and \$17,000,000 I believe was in there for the office building.

Commissioner JOHNSON. If I may inject at this point and attempt to save your time——

Mr. GENEEN. It is about the second page there.

Commissioner JOHNSON. On the first page of your letter to Mr. Waple of July 25, in the second paragraph, you refer to a Board meeting and its approval of this exchange of correspondence. You then go on to say "Of course, specific requests in the future will require specific ITT Board approval."

This is Page 1 of your July 25 letter, the second paragraph.  
Mr. GENEEN. Yes, sir, that is correct.

Commissioner JOHNSON. The last sentence was "Although there is no way of detailing with exactitude what ABC's needs might be in the future, they will embrace (a) proposals to make the network more viable and competitive and (b) programs which will serve the public interest."

Now, basically, what I am trying to develop here, Mr. Geneen, is that this does not constitute anything other than a most generalized expressions of desire on the part of the corporation, rather than a specific commitment of anything tangible to ABC.

[561] Mr. GENEEN. I follow your point, and could I proceed?

Commissioner LOEVINGER. When you got married did you promise to support your wife, Mr. Geneen?

Mr. GENEEN. Yes, sir.

Commissioner LOEVINGER. Did you tell her precisely how much money you were going to give her?

Mr. GENEEN. No.

Commissioner LOEVINGER. Do you think you have given her more money over the years than you would have done if you had been forced to specify the amount at the time of your marriage?

Mr. GENEEN. I believe so.

Commissioner LOEVINGER. Go ahead.

Commissioner Cox. Was the minister required to make a public interest finding?

Commissioner JOHNSON. That would be the more relevant issue.

Mr. GENEEN. I am sure I would never have got the merger through.

Let me address myself to your question, Commissioner, and see after I am through whether it begins to meet your requirement. I really wanted to read in the record the nature of how we arrived at the figure and the commitment we made.

First as I say, there was the March 18 letter in which a broad endorsement by our Board was given with full understanding that there would require the investment of money, time, to

[562] become a competitive network. Then in the July 25 letter of Mr. Goldenson to the Commission, he spelled out the costs of his facility program, which I think adds up to about \$124 million or \$141 million with the office building.

Both of these letters as well as the original exchange of letters in March, have been given to our Board and they are fully aware of it and they feel that this is a general commitment of the company, within their commitment from the beginning.

Our legal counsel informs me that this is a commitment of the company.

Now, I want to get around to the amount problem, which is a point that you made. What we have said here, and it touches on what Commissioner Loevinger said here, is that the exact amounts that we may be called upon to put forward in order to help ABC become a competitive network in the sense we have used, with programming and equipment and so on, are rather hard to define in advance.

This means if they want to spend \$50 million more than they ordinarily expected to spend or the whole \$120 million faster, it means that some portions of this may be earned by them, but there will be a sizeable amount that will probably be beyond their credit capabilities and the funds they have.

We have committed ourselves to put this money up.

Now, in my mind, this represents a commitment that the Board has seen on just those two items of facilities, of at [563] least \$125 million to \$140 million, depending on how you treat the office building. If there were no other funds coming up to defray it, that is involved. As I see it, the figure could be larger or it could be smaller.

Now, if it is of importance to the Commission, and I think that this is the point you are driving at, I will make a rough estimate of what the minimum amount would probably be, under any circumstances, and I would have to say that it is not with detailed planning or otherwise, our commitment stands for as I said originally, to make them a competitive viable network, and that might be \$150 million or more. But if you need a minimum figure, I will name one and we will be bound by it.

I am thinking from the standpoint of your record.



Commissioner JOHNSON. Well, as I said, it actually goes beyond that.

Mr. GENEEN. I understand.

Commissioner JOHNSON. The standard here is not simply one that all mergers are to be approved unless somebody can think of a good reason why not.

Mr. GENEEN. I understand.

Commissioner JOHNSON. The reasons is, will the public interest be served by the merger? Now, you have chosen to rest very substantially upon the case that this merger will serve the public interest because additional funds will be made available to ABC that would not otherwise be made available.

[564] As I pointed out this morning, it seems to me that there are several fallacies prior to that, in the proof as it has developed. But even taking that point alone, again I repeat there is nothing in the record whatsoever that demonstrates that to the extent what ABC needs is additional cash, that the cash it needs it cannot get on its own, that cash above and beyond that would be made available to ABC by ITT that would not have been made available but for the merger.

That it seems to me is your burden of proof, given the course of argument that you have attempted to develop. That is namely that the public interest is served by making more cash resources available to ABC.

Mr. GENEEN. I think the key missing factor here in the way you have presented it, Mr. Commissioner, is a statement or showing on the part of ABC that they would not be able to raise all of these funds as rapidly as they are going to need them.

Commissioner JOHNSON. It is both, a demonstration of ABC of what can it now raise and what will it do with it, and what would it like to have above and beyond that, and what would it do with that, how much of that increments committed by ITT, and what that purchase for the public? How will the public be better off as a result of this merger?

That is the standard, and as I say, you have chosen to demonstrate that the public will be better off because there will be more cash resources available to ABC which will be deployed [565] by ABC to produce results which will serve the public interest better.

Mr. GENEEN. That is right.

Commissioner JOHNSON. As I say, I think that there are a number of tender steps you have to take before you even get to that argument, but putting those aside for the moment, it seems to me this record does not sustain that burden.

I don't mean to pursue this. All I wanted to do was as I have put the question to others, to give you an opportunity if you can put it in the record, to put it in the record.

If you can't, I certainly don't mean to pursue it at this point because we have other things to do, and you do, and other questions to ask.

All I wanted to do was to raise it and give you an opportunity to answer and I think that we probably spent about as much time on it as it is worth.

I have tried it with other witnesses so far, and nobody has been able to come forward with it, and maybe that is the answer.

Mr. GENEEN. Maybe this would help, Mr. Commissioner: Our appraisal of what the competitive cost of additional news programs and so on, they are hard to get in advance, as you know some part of this is recovered, but there are two definite figures or three definite figures in that memorandum of July 25, the letter to the Commission. They add up to, if I leave out [566] the office building which I think is not necessarily—it is not exactly programming—they add up to \$124 million specifically.

Now, those are the only two figures that have been put forward at this time as we have said here our real basic commitment is to support them and in a completely competitive network approach which I think is the point that has the public interest.

Now, our comment is, could this be done anyway? Our own appraisal, and we have talked back and forth a little bit here, would be that it is pretty hard to ascertain in advance exactly what funds they would be short year by year, and color equipment, and everything is in short supply, and it is entirely possible that it might take three or four years if they move very rapidly to get this job done.

On the other hand, I was going to say if they relied only on their own financing my feeling would be that it could well stretch on another four or five years beyond that.

If it will serve the purpose of the record, my own rough appraisal is that the minimum they would get this down, just figuring what their cash flow is and everything else, would be in the order of \$60 million or more, but that isn't our commitment. Our real commitment is to establish and support them as being a viable completely competitive network in programming facilities.

If that helps the record to say that I consider ourselves bound by a minimum, because I notice the Bureau asked for a [567] rock-bottom figure, I don't think that that is the right answer in some sense, because our figure may be far higher than \$120 million. We are quite prepared for that. But if it helps the record, I will be glad to put it in.

Mr. GOLDENSON. If I may interrupt, in order to try to clear this record if I may, under our Metropolitan loan where we have borrowed \$70 million, it provides that we have a limitation of 50 percent of our assets as the outside limit of our borrowing. With the \$25 million we have just provided for in borrowing from the bank, we are therefore presently at a 47 percent level, so that gives us a latitude of 3 percent of our \$200 million.

My estimate is in order to accelerate our growth as we are now proceeding, with the complete colorization of our studios and to become completely in color by the fall of next year, day and night, we will probably be spending over the course of the next three years of the \$120 million that Mr. Geneen mentioned, we will probably be called upon to spend approximately \$70 million.

Now, we will be throwing off earnings, to be sure and we can borrow another \$6 million, but we are at a very tight point in order to accelerate our growth, and that is why in the discussions we have had with ITT, with the availability of the funds that we think would be available to us under our exchange of letters, we would then be able to accelerate our growth [568] probably to the extent of at least three years in advance of what we otherwise would be able to do.

We feel that this is highly important, to get into color as fast as CBS and NBC.

Commissioner JOHNSON. Let me put the question to you, Mr. Goldenson, since you are at least striving in this direction. What dollar resources do you believe are committed to you by ITT that would not otherwise have been available to you?

Mr. GOLDENSON. Anything that we cannot realize through the form of loans or earnings up to \$120 million that we outlined in a letter to Mr. Geneen, and he in turn cleared with his Board, would be available in backstopping us.

Commissioner JOHNSON. You indicated you planned to spend about \$70 million during the next three years.

Mr. GOLDENSON. Yes.

Commissioner JOHNSON. Now, is it the case that only \$6 million of that could be acquired by you without the assistance of ITT?

Mr. GOLDENSON. We are up to the full borrowing power, except for an additional \$6 million.

Commissioner JOHNSON. Is there another place you can go to obtain financing resources, except through a merger of this kind?

Mr. GOLDENSON. Or a sale of securities, which we think would be highly disadvantageous to us.

[569] Commissioner JOHNSON. But a sale of securities would be an alternative way of raising this capital?

Mr. GOLDENSON. Yes, but certainly a highly undesirable one, from our standpoint.

Commissioner JOHNSON. For what reason?

Mr. GOLDENSON. From the standpoint it would be a dilution of our stock, probably, if we were required to do this, and it would affect our stockholders adversely, and we would be opposed to that.

Commissioner JOHNSON. Although corporations obviously do use this route?

Mr. GOLDENSON. If they are selling at a high enough multiple, yes.

Commissioner JOHNSON. Now, do you feel, therefore, that you have a commitment at this point from Mr. Geneen for,

let us say \$64 million over the course of the next three years that would not otherwise have been available to you?

Mr. GOLDENSON. If we require it.

Commissioner JOHNSON. Do you think you will require it?

Mr. GOLDENSON. I don't think that we will require that much, no. We will be able to flush out a certain amount of money through our own earning power, over and above the dividend we are required to pay.

Commissioner JOHNSON. Do you think that you would need \$25 million?

[570] Mr. GOLDENSON. I think that we very well might need \$50 million.

Commissioner JOHNSON. Do you feel you have a commitment from Mr. Geneen for \$50 million?

Mr. GOLDENSON. Yes, I do.

Commissioner JOHNSON. Mr. Geneen, do you feel that you have made a commitment to Mr. Goldenson of \$50 million over the next three years?

Mr. GENEEN. I certainly do, and I think we have made a commitment in the sense that if he needs it and wants it—I don't think the \$120 million is the limit.

Commissioner JOHNSON. At this point we are trying to establish that there is some dollar amount that is going to be made available to ABC that would not be otherwise available.

Mr. GENEEN. Let us say \$50 million.

Commissioner JOHNSON. You are prepared to make \$50 million of ITT resources available to ABC, and you feel that you have committed that money to them?

Mr. GENEEN. Yes, sir.

Commissioner JOHNSON. Do you appreciate that that is not really contained in the letter which expressly says that before any commitment is made by ITT to ABC, it will have to be approved by the Board of Directors?

Mr. GENEEN. I am aware of that.

Commissioner JOHNSON. Are you prepared now to speak for [571] the Board on this matter?

Mr. GENEEN. No, the Board has already committed itself in principle, in a general commitment, and I think that I can speak for the Board in saying that they consider that a complete commitment.

Commissioner Cox. I take it where Mr. Goldenson referred to clearance with the Board, it was clearance in the general sense rather than a minute entry reflecting dollar amounts?

Mr. GENEEN. That is exactly correct. What is proposed here is a basic commitment, and if you want a minimum figure, looking crudely at our cash flow, we can say it is at least this much, and what we are saying specifically as they know how much they need, month to month or year to year, the demands will be made upon us.

At that time, the Board would look at it as a matter of knowledge, as I have spoken before, but I see no particular problem in this at all, because they have accepted the overall commitment as a commitment, a general commitment of the company.

Commissioner Cox. While we have Mr. Goldenson back in the act, if I could, Mr. Johnson, you have been talking, the two of you now, just about the commitment for facilities.

Mr. GENEEN. That is correct.

Commissioner Cox. Yesterday Mr. Goldenson was talking also about programming costs, and not just the increase that everyone is encountering in these costs, but the financing [572] requirements for carrying the existing \$140 million level, which I think he expressed as a 40-percent factor, or \$56 million.

Can you give us, Mr. Goldenson, some idea of how much of that requirement poses problems for you, on your existing operations, or can you handle that with your existing operations, and is your sole reliance on ITT in the facility area?

Mr. GOLDENSON. In connection with the sports side, I think that we, through sponsorship, will be able to realize that money back.

With respect to the news, and our improvement in the news, up to \$40 million by 1968, I would expect that we can realize in that increase in 1967 to '68 which is \$10 million increase, from '67 to '68—I would think that we will possibly realize some portion of that back but certainly no more than half of that, and probably not even half of it, in that particular area.

[573] Commissioner Cox. I think it goes a little beyond that. In other words, can you finance that missing half or better out of your current level of working capital?

Mr. GOLDENSON. Because of our capital requirements to go into color, this is why I said yesterday we can have the assurance of a continuity of our planning, whereas, if we don't have this assurance of continuity of planning we may have to cut back in our requirements for the growth of our News Department from the so-called \$30 million up to the \$40 million and, therefore, it is hard for me to answer that other than the fact I can say I can't tell you how business conditions are going to be between now and 1968.

As it is, based on the letter between Mr. Geneen and myself, which has been approved by their Board, we can be assured of our planning. Otherwise, we have to live year to year and try to make this thing cut its cloth.

We will have to cut back on our capital expenditures. We can't go entirely into color. We may have to project that over a long period of time. We become less competitive than we now are.

Commissioner Cox. Is it fair to say, then, that if you get this assurance of assistance on facilities from ITT, that that will relieve you of these capital pressures, and that whatever improvement in the programming field you feel is necessary you would be able to take care of out of existing funds [574] and sources of funds?

Mr. GOLDENSON. I think probably so. As I tried to point out yesterday, Commissioner Cox, there is an increase each year also in programming of about 10 percent. This has been brought about, increasingly so, because of color in entertainment. So where we have been spending roughly \$140 million a year, this will increase by 1968 by another \$28 million.

We are hopeful that we can realize all of that money back. I am assuming that the conditions will continue to improve and, therefore, we can realize it back.

I merely make this statement that if business conditions should fall off, therefore, we would have to cut back even further, if business conditions would fall off. However, by reason of our arrangements with ITT, we can plan in advance and assure our affiliates as well as our own people that we can plan this three years in advance.

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## TESTIMONY OF LEONARD H. GOLDENSON

[575] At the present time, we are only realizing back on our news somewhere around 25 to 30 percent of our investment in the news. As you know, we go into color and into a half-hour news starting the first of the year. It will take time before we can start realizing more than, say, the 30 percent back.

We will eventually improve this as time goes on, and we get an acceptance on our news. But it is during these earlier periods that we have to make the investment and by having the assurance of this protection by ITT we can make these plans to go forward.

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## TESTIMONY OF HAROLD S. GENEEN

[583] Mr. GENEEN. One minor thing, Mr. Commissioner. I may have misspoke, but I intended to say we did not see a large telephone market to us in the U.S. We are in the telephone field, but it obviously is a restricted market.

I did say, I think, in speaking to Commissioner Cox, that if we did go into this because of the greater incentive that it offered us as apart from perhaps our ordinary commercial considerations, that we would, and this was basic to our policies, but on the other hand we said it quite clearly, make any such equipment we developed available to anyone in the [584] broadcast field.

As to how we can demonstrate in advance that such an application of a lot of our existing R&D would, in effect, benefit the broadcasting industry as a whole, or individual areas of ABC is rather hard to demonstrate in prospect. I think this has to be demonstrated by actions and performance.

Commissioner JOHNSON. Again, it seems to me the burden is not simply one of demonstrating that ITT will benefit the broadcasting industry generally, or that ITT will benefit ABC. The burden is rather one of demonstrating that ITT will benefit ABC more as a result of the merger than it would have benefited ABC without the merger, if you want to put any weight on this argument at all.

Mr. GENEEN. If it is a consequence to the record, I would say that we have not looked on this field in the past as a field

that we wished to enter. It may be that in the future we could have changed our minds. But I can say very simply that if we had this merger we would not only change our mind, but we would pour money into it with the ultimate end result of having a competitive network and speeding up conversion of UHF, and the very things that are necessary, among other things, to be competitive on signal, quality and, finally, viewer access.

Commissioner JOHNSON. Well, I think that is enough on that.

We also have the reciprocity problem. Yesterday you simply [585] declared that it was company policy not to engage in reciprocity practices. The potential involved here is ABC as a buyer, ITT as a consumer, desire on the part of sponsors to get prime time, a potential incentive on their part to utilize Avis or other ITT subsidiaries.

Again, it would seem to me that about the best position you could take on this would be to say, "Yes, it is a potential problem but (a) it is not of economic consequence to us; and (b) besides that, we don't believe in it; we think it is immoral," or whatever you want to say.

Do you have anything more than that to say?

Mr. GENEEN. I would subscribe to all those statements you just made, Commissioner. I think in talking to Commissioner Cox a moment ago I made the overall statement for the general consideration of the Commission that in reaching our decision to go forward with ABC, that at no time did these peripheral possibilities in any way impinge on our judgment. They have no particular meaning.

I think yesterday you asked, as a matter of record, whether we could provide you with the figures, I think it was you, Commissioner, of how much we bought from the largest advertisers on ABC. I think it may be some indication of how we carry out what I have said is our policy in our company—

Commissioner JOHNSON. You are not able to answer the question?

[586] Mr. GENEEN. We haven't any figures at all on this subject. They tell me we can do a lot of work and get all of these together, but I think in itself that is a pretty good indication.

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[591] Commissioner JOHNSON. Mr. Geneen, you mentioned earlier this afternoon, that you at least had held some conversations with regard to the possibility of acquiring a different network.

Had ITT also given attention to the possibility of buying other stations, the stations of other group owners, or establishing its own network, or backing Overmeyer or similar enterprises of that kind?

Mr. GENEEN. Well, Mr. Commissioner, I think the first thing should be clear, that ITT on its own would be very hesitant to [592] move into any kind of a network, since we do not have the experienced personnel that would be required for that. I can say very clearly that we never considered a network, per se, like the Overmeyer Network, which is the comparison you use.

We did hold some conversations from time to time in a general way, with people who purported to think we should get into stations, and that sort of thing, but we never got anywhere with that.

Commissioner JOHNSON. You have been well advised. Approximately how much of your time would you say you spend dealing with the international side of ITT, time spent reviewing reports from those companies, and travel abroad, and so on?

Mr. GENEEN. Well, I would have to split these up, between the areas and you might call the headquarters duties. I would say something around 25 or 30 percent maximum.

I also should add it declines as our management strength grows.

Commissioner JOHNSON. Do you have personnel who advise you regularly regarding political conditions in countries where ITT has interests, or you have other reports available to you regarding this, or consultants?

Mr. GENEEN. A policy that we have followed in all of our foreign operations, with very few exceptions, and there are a few, is that all of our companies are manned by nationals of those countries, from the top down.

[593] Basically, in the long term, these individuals have been fairly high in the activities and government circles, as well as

banking and financial circles in their countries, and we rely on them for our basic advice.

Now that doesn't mean that we don't use somebody like Mr. Saulnier to give us an overview of a completely independent and objective viewpoint of the economic trends in these areas, and from time to time we may hire a special consultant for specific projects.

Commissioner JOHNSON. But I assume you personally make an effort to keep on top of political conditions in those countries in which you have interests?

Mr. GENEEN. Yes, we do, but mostly by reference from reports and people we know that are in these areas.

Commissioner JOHNSON. People on the scene?

Mr. GENEEN. Mostly internal people.

[596] Mr. GOLDENSON. We would like to make the most successful programs we can here that will sell world-wide, yes.

Commissioner JOHNSON. Do you think that your potential association with ITT would aid you in this regard?

Mr. GOLDENSON. If we are able through development to produce better programs, the answer would be yes.

Commissioner JOHNSON. But I means as a result of their contacts, these men that Mr. Geneen referred to that ITT knows, and that you will come to know if you don't already—

Mr. GOLDENSON. My experience with dealing with television stations throughout the world is exactly the same as the United States. The person buying those programs is not interested in who owns the product, but is the product sufficiently good to command an audience on that screen.

In the last analysis, the person buying that product will lose his job if he doesn't get it on the screen.

Commissioner JOHNSON. Again, it would seem to me only obvious that you would benefit to some extent in your association with ITT.

Mr. GOLDENSON. Not at all.

[600] Commissioner WADSWORTH. This may have been discussed when I was unavoidably out of the room, either last night or one time or another today. It has been pointed out

several times that approximately 60 percent of the income comes from foreign operations. Do you have the ratio of stockholders?

Mr. GENEEN. Yes. Our foreign stockholders are slightly less than 7 percent.

Commissioner WADSWORTH. Which?

Mr. GENEEN. I am talking about ITT.

Commissioner WADSWORTH. I know. But American stockholders?

Mr. GENEEN. Excuse me. 93 percent U.S. stockholders, 93-plus U.S. stockholders, and 6 percent-plus foreign stockholders.

Commissioner WADSWORTH. Thank you.

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[730] Presiding EXAMINER. Gentlemen, in view of the discussion that came up this morning involving Mr. Cohn, and official notice of certain publications, I think I might announce now some of the ground rules I planned to lay down Monday, but that might be too late.

First, the subject of objection and exception. The Commission will take official notice of standard reference works and industry publications in the field of communications to the extent that the data therein may be relevant and material to any of the issues of the case. Such publications would include Broadcasting, 1967, Yearbook; Television Fact Book, 1966 edition; and the 1967 edition if that is available.

[731] Television Digest 1967 CATV log; Television Magazine, March 1967 CATV issue; Broadcast Equipment Buyers' Guide, the 1967 edition.

\* \* \* \* \*

[780] TESTIMONY OF RAYMOND J. SAULNIER

By Mr. KESTENBAUM:

Q. On page 6 of your statement, sir, at the top, you stated as follows: "The structure of the broadcasting industry in the United States will be precisely the same after this merger is fully consummated as it is at present."

A. That is correct.

[781] Q. By that you meant, I take it, that there were three networks before and there will be three networks now, is that correct?

A. That is correct.

Q. Do you consider that the impact of a merger upon the potential competition of other parties is an element of industry [782] structure?

A. I would say that it is relevant to potential industry structure.

Q. But you didn't consider it when you made the statement to which I referred, isn't that correct?

A. I was referring to the structure as it exists. I would be glad to direct myself to a matter of potential industry structure, if you wish me to do so, but——

Q. I am just asking you for your basis for this statement and you have answered my question, sir.

A. All right.

Q. You don't consider yourself, sir, or claim to be, sir, an expert in broadcasting economics, do you?

A. I do not claim to be a specialist in broadcasting economics, no. Although I have, as you can imagine, interested myself.

CHIEF HEARING EXAMINER. I think the question has been answered. Proceed.

By Mr. KESTENBAUM:

Q. Well, since neither of us is an expert in this field, I would like to turn to a more general proposition in economics which is a little later in your statement, where you referred at several points to the effect of the merger in bringing the networks into competitive parity.

By competitive parity, sir, to what did you refer?

[783] A. I meant that they would be more equal contestants in a competitive market.

Q. By equal contestants, I assume you refer to the quality of over-all size and resources, isn't that correct?

A. I refer to their capability as competitors, which is a function from all standpoints.

Q. Do you believe, sir, that equality of over-all size and resources is necessary in order for a company to be an effective competitor?

A. No.

Q. In a particular market?

A. No, I don't believe so.

Q. Do you believe that competition is enhanced when competing companies are of over-all equal size and resources?

A. It is quite possible that it can be. But it is possible, it is perfectly possible in a competitive market for a company that is relatively small, relatively small as to the others, to have a strong competitive position.

Q. Are you familiar with the writings of Professor Walter Adams and Professor Joel B. Dirlam?

A. In a general way, sir.

Q. Are they well regarded in the field of economics, sir?

A. They are.

Q. There is an article which they wrote which is published in the quarterly Journal of Economics, Volume 53, beginning at [784] page 167, entitled "Big Steel Invention and Innovation."

A. Would you repeat the reference, please?

Q. It is Volume 53, page 167. It was the May 1966 issue.

A. Thank you.

Q. It is Walter Adams and Joel B. Dirlam.

CHIEF HEARING EXAMINER. What is the question?

By Mr. KESTENBAUM:

Q. The article concerned the introduction of the oxygen method of steel making into this country. I would like to read to you a conclusion from page 188, after they have told the story:

"It was a small firm that first innovated the new process in the United States, and it was other small firms that followed its lead.

"We submit that this consequence should not be entirely unexpected, because it may well be that the structural and behavior characteristics of oligopolized industries prevent the dominant firms from pioneering. Instead, the small firms may be the innovators because unlike their giant rivals what they do in the way of cost reductions is unlikely to cause so violent a disturbance of the status quo.

"Hence, based on the steel industry experience, it seems reasonable to assume that innovations sponsored by firms in inverse order of size as it is to assume the contrary."



Would you agree with that conclusion? Would you think it is [785] a reasonable conclusion?

A. I am not sure that I would want to associate myself with the rather rigorous statistical statement of relationship, but I would be perfectly happy to agree that it is quite possible for a firm that is relatively small as one of the units of an industry, to be an important innovator in the industry.

Q. As a matter of fact, it is also quite possible that a diversity of size will contribute to competition and innovation in an industry, isn't it, sir?

A. That is perfectly possible, and the innovation of which you speak, I would expect, is one of the roots by which a small company becomes a larger company.

Q. Professors Adams and Dirlam wrote another article on the steel industry, Volume 54 of the American Economic Review, beginning at page 626. The name of it is "Steel Imports and Vertical"——

A. What year?

Q. 1964, Volume 54, Professors Adams and Dirlam. The title is "Steel Imports and Vertical Alogopaly Power."

They discussed the reaction of the steel industry to various imports that were coming into this country; on page 652, they state the following:

"While the independents were successful at least temporarily in meeting the import challenge and products by using lower priced foreign rods, their integrated rivals could not embrace [786] this solution which for them would have meant a denial of the *raison detra* of vertical integration.

"To the integrated firms, it obviously seemed preferable to abandon a single-product line than to jeopardize their investment in an entire branch of the industry."

And above on the same page, they say, "The integrated giants preferred to abandon the field to imports altogether rather than to reduce their product prices."

That is referring to certain particular product lines.

Do you believe that is a reasonable statement of the circumstances that were discussed there?

A. I have no reason to question the accuracy of your quotation, and I think that it is quite possible that the reaction of the industry was indeed as described by the authors.

Q. In the situation that I just read about, evidently the larger integrated firms were less competitive in the particular product lines which they abandoned?

A. What do you mean by that?

Q. Well, the passage that I referred to states that in response to imports, the unintegrated firms lowered prices and competed, and the large integrated firms, because of their other interests, abandoned certain fields to imports entirely.

A. I think that is quite likely to happen.

Q. Well, then you would agree, sir, that the equality of over-all size and over-all integration or conglomeration is not [787] necessarily a good thing for competition. It depends upon the circumstances.

A. Well, I don't think that I would want to say that. Certainly that general proposition that you have made does not follow from the quotations you have just read to me.

Q. Well, we have read about a situation in other industries—

CHIEF HEARING EXAMINER. Let the witness finish.

The WITNESS. I am not prepared to make an over-all generalization about size.

By Mr. KESTENBAUM.

Q. My question was whether it was necessarily a good thing. We have read about a situation in which innovation came from the smaller firms. We have read about a situation in which the smaller unintegrated firms responded in a more competitive way to a certain market situation. At least, we could say that there is not necessarily an enhancement of competition from equalizing the over-all size and conglomeration of firms in an industry.

A. I would say it is not inevitable that the increasing of size would make for greater competition, more intensive competition. It is not inevitable.

Q. As a matter of fact, in some circumstances, as that oxygen process article indicates, a certain diversity of size and a certain diversity in integration is a healthy thing.

A. What I said is that I think it is quite reasonable to [788] expect that technological innovations can be made through the vehicle of firms that relative to others in the industry are of small size.

I don't want, Mr. Kestenbaum, to go beyond that statement. If I may say so, I think that the industrial history of the United States is replete with examples of just exactly this sort of thing.

Q. Would you give me another example, sir, of an industry in which that last occurred?

A. Let us take a field that is really quite—I was tempted to say very different from network broadcasting, but perhaps it isn't. I was thinking of retailing. You can take the development of discounting—the so-called discount store.

Again I don't want to pose as a specialist or expert in retailing, but it has been my general observation that this development was sparked, if I may use that expression, by relatively small companies. They were companies that have by virtue of their capability to innovate, have increased in size, increased in their competitive position, and improved their fortunes in the industry, and if I may add finally, to the public benefit.

Q. These firms used innovation as you referred earlier, and they also used discounting, if that is appropriate, for a new entry?

A. I am thinking of discount as an innovation here, a merchandising technique.

[789] Q. Do you know that ABC has been sometimes termed a discounter in this industry?

A. I can't say that I am familiar with that, the use of that particular expression in the industry.

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[827] By Mr. COHN:

Q. Doctor, will the improvement of UHF, no matter what the source for the improvement might be, enhance the viability of ABC as a network?

A. Here, sir, I am going to speculate, but it is my judgment—

Mr. KESTENBAUM. I object to the speculation of the witness.

Mr. COHN. It is a question of opinion.

Mr. KESTENBAUM. The witness is not qualified to express an opinion on the broadcasting industry.

CHIEF HEARING EXAMINER. I will sustain the objection to the question.

By Mr. COHN:

Q. Doctor, do you have an opinion on the effect that the merger will have on the number, and I had underscored the word "number," of affiliated stations ABC will have?

A. Do you want to repeat?

Mr. KESTENBAUM. Same objection.

CHIEF HEARING EXAMINER. Sustained.

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TESTIMONY OF ROBERT E. CHASEN

[848] Q. Showing you J-119, which is a general overview, dated June 25, 1965, this is a document which you prepared, is it not?

CHIEF PRESIDING EXAMINER. I wonder if it cannot be made the subject of a stipulation.

Mr. COHN. Mr. Chasen, did you or did you not prepare this? Answer the Examiner.

The WITNESS. Specifically I recall preparing the synopsis personally. The rest would have been prepared by staff.

CHIEF PRESIDING EXAMINER. Proceed.

By Mr. GORDON:

Q. And this document was sent to ITT Headquarters with your concurrence, was it not?

A. This document, to my recollection, was sent to John W. Gilfoyle, who was my superior at that time.

Q. Was Mr. Gilfoyle attached to ITT Headquarters?

A. He is a group vice president.

[879] TESTIMONY OF ROBERT E. CHASEN

By Mr. GORDON:

Q. In these CATV systems for which ITT-FEC had loaned money and executed turnkey contracts, the aim was to use ITT [880] equipment insofar as that equipment was suitable and available, was it not?

A. If ITT could make the equipment on time to meet our

schedules, we would have made every effort to use ITT equipment. It was a question of whether they could have met the schedules.

Q. The CATV corporation itself did not go out and seek competitive bidding for the equipment to be used, did it?

I am sorry. It was FEC which was executing the turnkey contract; that is right. Well, FEC did not go out and solicit competitive bids for any equipment. It first looked to ITT, and if that was not available, you got the equipment where?

A. At this time, knowing ITT could not meet the schedules, we did get competitive bidding on some of these operating systems.

Q. But if ITT had some cable available, for example, which could be used for the system, you would have looked to ITT to furnish the cable, would you not?

A. Well, they did not have it available. We would like to have given—the only two things that ITT could have made, to my recollection, are connectors and cable, and we would have liked to have used this equipment if it were available. We would try to have used it. They would have had to be priced competitively.

Q. But if they were priced competitively, you would have used it if it was available; is that right?

[881] A. Yes.

Q. So when Mr. Geneen wrote to Mr. Guilfoyle on October 27, J-134, Item 10, "By separate memo copy to you, I will ask John Thompson to get busy on the development of our own equipment, cable, amplifier and stations, and the possibility of a cheaper slave TV set for color," that information came down to you, did it not, that Mr. Geneen was interested in having that done, if possible?

A. I knew he would be interested in that.

[903] A. We are required every month to produce financial information through our controllers department. Our Comptroller would report the financial data.

Q. Did FEC have any problems regarding possible conflicts of interest with other ITT companies in this sense: FEC might want to finance and construct and get an equity interest in a

CATV system in a particular area where there might be an independent telephone company. That telephone company in turn would be a purchaser of telephone equipment from another ITT company, perhaps ITT-Kellogg or NALCOM. Did you experience any problems in that regard, where the independent telephone company might also want to put a CATV system in its area on its own, and so might resent the intrusion of FEC.

A. I could not describe it as a problem. I did hear that the telephone group did raise some questions about our activity.

Nothing was ever said to me directly, that I can recall.

Q. You do know that a CATV systems basic functional responsibilities chart was prepared on January 4, 1966, which is J-79. I believe you stated you are familiar with that document.

[904] A. I have seen this document.

Q. Does this chart reflect that FEC may not make any CATV plans or proposals in a territory served by an independent Telecom without the understanding and concurrence of in a Telecom may not participate in any CATV work without understanding and concurrence of FEC, and that conflicts between in a Telecom and FEC would have to be resolved by ITT headquarters?

CHIEF HEARING EXAMINER. Are you asking if that is what is in the exhibit?

Mr. GORDON. Is that your understanding of how the operations of FEC, and NA Telecom work in connection with this problem of relations with independent telephone companies.

The WITNESS. That was my understanding of what had been happening concerning the Telecom group.

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[907] By Mr. BAKER:

Q. Mr. Chasen, in J-259, at page 28, the TVA contract with ABC, it is stated: "Early in 1965 Federal Electric Corporation was given the go-ahead to engineer and install the ITT Worldcom Television Operating Center. A short 13 days later the task was completed and the system was declared operational."

Now, the question, sir, is to your knowledge is ITT Worldcom a wholly-owned subsidiary or division of ITT?

A. I can't answer that question.

Q. You don't know?

A. I do not know.

[908] Q. How did you become aware whether that ITT Worldcom was interested in letting such a contract?

A. They came to FEC and asked us to help them in setting up this clearance center.

Q. In setting up this clearance center?

A. Which originally was at the Pan-Am Building.

Q. To your knowledge, was this contract let for bids by other companies?

A. You mean the contract between us and Worldcom?

Q. Yes.

A. My guess would be that it was an in-house project, and not let to another company.

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[909] Q. Mr. Chasen, do you have occasion to travel on business?

A. Yes.

Q. When you travel on business, do you have occasion to rent a car?

A. Yes.

Q. From whom do you rent the car?

A. We generally now rent Avis cars, but we frequently Budget cars.

Q. Approximately what would be the proportion on that, sir?

A. Mostly Avis.

Q. How do you decide whether to use a Budget car or an [910] Avis car?

A. If an Avis car is not available, we will then go to some Budget-type of rental.

Q. Is this the result of a directive or did you do this on your own decision?

A. To the best of my knowledge, we do this on our own.

Q. You are not instructed by anyone to rent Avis and Avis only when it is available?

A. No. I frequently use Hertz cars, myself, when Avis is not available.

Q. There is one other short area I would like to go into very briefly. Does Federal Electric Corporation have a board of directors?



A. Yes, we do.

Q. How often does it meet?

A. We have a minimum of one annual meeting.

Q. What is taken up at those meetings?

A. We generally explain to the directors our operating and financial results.

Q. Are there any outside directors on the FEC board?

A. A retired Army general, who was a former president of Federal Electric Corporation, is one of the outside directors. He is no longer with ITT.

Q. He is the only one?

A. He is the only one I can recall.

[911] Q. Are the others officers of Federal Electric Corporation or employees?

A. I think Jack Vollbrecht is now a director.

Q. What is his position at ITT Headquarters?

A. He is the Vice President of ITT.

Q. Is this what is called an executive vice president?

A. I don't know his exact status in the system.

Q. Sir, would it be correct to say that FEC shows a profit each year?

A. We have shown a profit in the last three years that I have been there.

Q. Is this money retained by FEC for FEC purposes?

A. No. It is declared as a dividend to ITT, which owns all our stock.

Q. The entire profit?

A. That is correct.

Q. May I ask you this question: Where do you receive the money? You have certain expenditures, I assume, through the course of the year, salaries and things of this kind. Do you maintain an operating capital for the purpose of meeting the day-to-day expenses?

A. We are an integrated corporation. When we need cash, we get it from ITT, but we do have bank accounts and we operate completely independent of the parent company financially, except that they review everything we do and when we need money we in [912] FEC borrow it from Headquarters.

Q. How does this review take place? What are the procedures for review? As I recall, there was some mention at some point about monthly meetings in New York. Do you attend those meetings?

A. FEC is part of the U.S. Defense Group. We have a meeting once a month, at which every matter is gone into in depth, financial, marketing, every facet of the business. I have to explain every facet of our business each month.

Q. You also at those meetings bring up any problems which you have, is that correct?

A. Financial problems.

Q. But not operating problems?

A. Generally unless they concern other divisions, I will discuss my operating problems with my boss privately.

Q. What is the maximum capital expenditure which you are authorized to make within the Federal Electric Corporation for replacing existing plant or equipment without consulting anyone outside the Federal Electric Corporation?

A. To the best of my knowledge, the current order is all capital expenditures have to be approved by Headquarters. Not buying office supplies, but any capital—

Q. Any asset which would have a life of over a year?

A. Yes, roughly that is right.

Q. I assume that because of the relationship between ITT [913] Headquarters and FEC, that there are some standards for determining whether FEC is doing as well as it should. What are the standards in making this determination?

A. ITT is a scientifically managed company. If you saw our reports, there are all kinds of ratios. I could name quite a few, profits to sales, return on investment, numerous dynamic margins, anything that has been invented we have it.

Q. All of these things are used to measure the performance of FEC?

A. I think that the New York staff spends a considerable amount of time using these scientific techniques to evaluate our performance.

Q. Would it be fair, and please correct me if you think this is unfair, to say that two things in which Headquarters is very much interested in is profits and growth—growth in sales?

A. Yes.

[918] Q. You were telling us who Mr. Guilfoyle was.

A. He was Group Vice President, U.S. Defense Space Group, and my boss.

Q. You were answerable to him?

A. That is correct.

Q. What was Mr. Vollbrecht's position at this time?

A. Mr. Vollbrecht was not with ITT until sometime in the [919] middle or late 1965, to the best of my knowledge.

Q. But he did enter the CATV picture sometime in at least November of 1965, did he not?

A. I think the memo was October, when I first heard that he was involved.

Q. When he did enter what was his role?

A. He represented Mr. Geneen in a staff capacity.

Q. Since he represented Mr. Geneen, you felt you were answerable to him, did you not?

A. I felt in a staff capacity I was answerable to him and in a line capacity to Mr. Guilfoyle.

Q. Now, sir, the preparation of the weekly status CATV reports was the result, was it not, of a direction by Mr. Geneen which appeared in what is now marked as J-122, and more particularly page 9, No. 21, where he specifically said that a weekly report should be made available?

A. My recollection of Mr. Guilfoyle on the basis of this suggested that I prepare weekly reports.

Q. This met with Mr. Geneen's consent?

A. I have to assume that.

Q. Now, sir, directing our attention to this document that was prepared by you for Mr. Guilfoyle to Mr. Geneen, that bears the date of November 2, 1965, was there a meeting held on November 2, 1965, where the overall CATV position of FEC and ITT was discussed?

[920] A. There was such a meeting.

Q. Did you attend that meeting?

A. Yes, I did.

Q. Will you tell us what was discussed at this meeting and what decisions were made?

A. This meeting was held at ITT Headquarters in New York. The FEC group presented its current status. It outlined all of the problems it knew about, it described the systems which were involved and it indicated that we had roughly \$8 million of commitments with about \$6 million of turn-keys, as I recall.

Mr. Geneen asked many, many questions. The thrust of his questions raised points such as the copyright issue, the lease-back problem we were running into with AT&T, the AT&T position on pole rentals where we were in effect at their mercy for the period of time that they wanted to rent the poles.

We went into the microwave grant issue. We talked about the slow pay-back of CATV systems. Mr. Geneen seemed particularly interested in tying down a subscriber. He was greatly concerned about what he called "over-builds." He wanted to know what we were doing to tie down a subscriber so that someone else could not build a system on top of us.

We discussed the whole exclusivity problem, because the exclusivity problem brought out the fact there were very few exclusive franchises. Mr. Geneen was tremendously concerned, [921] again from the over-build point of view. We talked about this problem of offending telephone companies.

Mr. GORDON. I have been listening to the witness, but I think his testimony is improper. He is not saying about who talked about what. He is saying we all talked. It seems to me he should specify who said what at this meeting.

Mr. COHN. The question was, what was discussed at that meeting. The witness is now taking up the subjects of what was discussed at that meeting.

Mr. FITZPATRICK. I understood it was Mr. Geneen asking these questions.

The WITNESS. These are the subjects I think Mr. Geneen discussed with us across the table. He was involved, in my recollection, with every one of these points I recall here. We were concerned about the quality of individuals in this business. We discussed the attractiveness of our finance package which was becoming less attractive at this point in time.

We discussed something that was of paramount interest to FEC at that time, the effect of satellite transmission on CATV.

And we talked about regulations. At that time we were greatly concerned about what the FCC might do about CATV. These are some of the things I can remember.

By Mr. FITZPATRICK:

Q. Were any notes taken at this meeting?

A. I do not recall any formal minutes being taken. It [922] was Mr. Geneen's meeting. I don't know whether he had minutes taken.

We did not.

Q. Have you recently refreshed your recollection in any way concerning this meeting?

A. I have not about this meeting. I have tried to think of all the things which were discussed at this meeting, because it was such a critical meeting to FEC at that time, because it brought us to the realization of all the problems that were inherent in CATV.

Q. Who was present at that meeting?

A. I would estimate there must have been at least 50 people in the room. I don't think I can name all 50. My senior staff from FEC was present plus key people from RCA TV Division. Mr. Geneen had many people from his staff there.

Q. Was Mr. Geneen the one who raised most of the questions?

A. He seemed to be armed. He seemed to have material or he had an excellent memory and he seemed to have prepared himself for the meeting.

Q. To your knowledge did he have available to himself at that time the November 2, 1965, memo that you prepared?

A. I have no way of knowing that.

Q. You don't know whether that was in the room at the time? [923] A. No. I know the memo and I know that I brought it over to Jack Guilfoyle, but I don't know what happened after that.

Q. You are familiar with the content of that memo?

A. Yes, very familiar.

Q. Having prepared it?

A. I reviewed it very carefully and did considerable work on this memo before giving it to Mr. Guilfoyle.

Q. You said at this meeting you discussed the service finance package that had been developed between FEC and Kellogg Credit, is that correct?

A. Yes.

Q. Did FEC ever construct any CATVs other than as part of the service finance package arrangement?

A. No, we did not.

Q. You did so under the service package arrangement?

A. That is correct.

Q. Did FEC ever seek to obtain any service work other than under the service finance package deal?

A. I believe that we made quite a few efforts in the industry to sell turn-keys.

Q. But were unsuccessful?

A. I think that we did not have a successful bid.

Q. Can you remember to what companies you attempted to sell?

A. No, I can't remember. I know we did try to get some [924] contracts.

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[930] Q. Now, sir, what decision if any was made at the December 2 meeting where the 50 people, including Mr. Geneen, were present?

Mr. COHN. You said December 2.

By Mr. FITZPATRICK:

Q. November 2, excuse me. As to what should be done in connection with the CATV as far as FEC is concerned?

A. It was Mr. Geneen's judgment to put us into a freeze at that particular time because of the many pitfalls of the CATV business that were presented at the meeting.

Q. At that meeting was any mention made of any negotiations [931] with ABC?

A. I do not recall ABC being mentioned on any occasion at that meeting.

Q. Now what authority did you have as President of FEC as far as progressing on CATV development subsequent to November 2?

A. As a result of being placed in a freeze, I could only concentrate on those operating systems on which we already had commitments.

Mr. COHN. Mr. Fitzpatrick, I think you said November 5. I believe you meant November 2.

Mr. FITZPATRICK. November 2, yes.

The WITNESS. November 2, yes.

By Mr. FITZPATRICK:

Q. Now, sir, with respect to pay television, you had a meeting, did you not, with Mr. Levy in November 1965?

A. I did.

Q. Was that meeting at your office?

A. It was in Mr. Pitman's office, which is in Paramus. It is in another building. FEC is located in two buildings in Paramus.

Q. That meeting was held on November 1965, is that correct?

A. That seems correct.

Q. Mr. Vollbrecht, the Vice President from ITT Headquarters, [932] was present, was he not?

A. That is correct. I invited him.

Q. Did he not state at the meeting he was there as an observer for Mr. Geneen?

A. He stated that.

Q. Now, sir, had you not prepared a report for Mr. Geneen's study relative to Skiatron?

A. I don't recall any such report. I may have prepared an information-type memo for Jack Guilfoyle, but I can't remember it positively.

Q. Let me read to you a statement made by another individual and you can testify as to its accuracy or inaccuracy.

Mr. COHN. Is this a J document?

Mr. FITZPATRICK. I am reading from J-307. It is a memo for the files by Mr. Arthur Levy of a telephone conversation he had with Mr. Black of your organization.

CHIEF PRESIDING EXAMINER. What is the question now?

Mr. FITZPATRICK. I am going to read to him what was attributed to him and see what comments he has to make.

By Mr. FITZPATRICK:

Q. "I," being Mr. Levy, "telephone John Black of Federal Electric at 5:05 p.m." This is on September 15, 1965. ". . . this afternoon and John said that Bob Chasen and he had prepared a report on Skiatron several weeks ago and circulated it to



Geneen, President of ITT, and also all heads of the various communications [933] divisions, but through an error of delivery Geneen did not get his copy until yesterday. John said it was a favorable report principally on Skiatron and also mentioned STV, but put more emphasis on Skiatron."

[935] Q. You discontinued the furnishing of the weekly CATV status reports on your own initiative?

A. Yes.

[937] By Mr. FITZPATRICK:

Q. What do you mean by the term an "in-house project"?

A. We frequently team up several divisions and will bid [938] on a contract and we try to win the contract, giving ITT products as much of the contract as possible. So we keep as much of that contract in-house as we can.

Q. What criteria is used in determining whether or not it should go to the in-house project rather than to a competitor?

A. No. 1, capability. No. 2, competitiveness. No sense competing unless you can win.

Q. Now is there some percentage of profit margin that is considered in determining whether or not the outside people should be preferred over the in-house group?

A. There is no rule that applies to that. I personally have applied a 10 percent rule, but that is just my judgment. If an ITT house can come within 10 percent, I usually can justify that 10 percent by saying it equalizes. The fact of working with an internal company has material benefits.

Q. Now, sir, with respect to the CATV committee, you chaired that group, did you not?

A. That is correct.

Q. Was the meeting of November 2, 1965, a meeting of the CATV committee or what meeting was that where Mr. Geneen was there?

A. The November 2 meeting, as I recall it, grew out of Mr. Geneen's increasing concern about the fact that FEC was investing millions of dollars and he wanted a thorough review in depth of the entire situation. To my recollection he requested [939] the meeting.

Q. Now, of the 50 people there, were most of them from ITT Headquarters?

A. Well, I would say about—there must have been maybe 10 to 20 people from FEC. I think we had pretty near everybody who was working on CATV or related to it, our marketing people, our CATV Division, our senior staff members of FEC, our Planning Department. I think we had a contingent maybe of 20 people.

\* \* \* \* \*

[940] Q. How many meetings did that committee have?

A. I think we only had two meetings.

Q. What was the purpose of the committee?

A. It was our feeling that it might be helpful to get assistance from ITT staff in solving some of the problems, if they could be solved, concerning CATV. After a couple of meetings, the problems which I enumerated before were all more or less insoluble. They didn't have the answer any more than we had, so I discontinued those meetings.

Q. Following the November 2 meeting Mr. Geneen put a freeze on any further CATV expansion, is that correct?

A. He put us in a freeze, yes.

Q. The only thing you could go ahead with was what had already been committed?

A. That's right.

Q. Was that freeze ever lifted?

A. To my knowledge the freeze was never lifted.

Q. You sort of phased yourself out of CATV activity and just finished your commitments?

A. That is correct. We turned them over to the new CATV Division.

Q. That is your present posture?

A. That is our present posture.

\* \* \* \* \*

[949] Mr. COHN. That is 77, Mr. Gordon.

By Mr. COHN:

Q. Mr. Chasen, on Page 9 of 119, there is the word "nuts," n-u-t-s, with two lines drawn under it. Do you know whose handwriting that is?

A. It looks like Mr. Geneen's handwriting.

Q. He was referring to a specific item on Page 9 of Exhibit J-117?

A. Yes.

Q. Referring to Page 23, the first two paragraphs of 117—  
Mr. FITZPATRICK. Is 117 the one or 119?

Mr. COHN. I am terribly sorry, it is 119.

By Mr. COHN:

Q. As far as both those paragraphs are concerned, is that part of convention talk to which you made reference in replying to one of Mr. Gordon's questions?

Mr. GORDON. Again I think counsel is leading the witness, Mr. Examiner.

CHIEF HEARING EXAMINER. I think he is trying to expedite the proceeding. I think the questions are harmless.

Proceed.

The WITNESS. Paragraph II is strictly what I call convention talk.

[950] By Mr. COHN:

Q. And Paragraph I on Page 23?

A. Paragraph II on Page 23?

Q. No, Paragraph I at the top of the page.

A. Yes.

Q. Paragraphs I and II?

A. Yes.

Q. Are what you would call convention talk?

A. Right.

Q. You were simply making report back of what you heard at a convention of CATV operators?

A. Right.

\* \* \* \* \*

[952] Q. On page 2 I direct your attention to the middle of the page beginning "The following action items were assigned for next week" and particularly Items B, C and D. Why were those items assigned as they are set forth there for next week?

A. Item B was assigned because, as I stated, we had a problem in New Jersey and this was considered of paramount importance to use.

Q. That is once again the PUC problem.

A. The Public Utilities Commission problem.

Q. The next, sir.

A. Assignment, effect on CATV of FCC control. There was all kinds of—everyone in the business was making guesses and

we thought it would be nice if the legal department gave us a good educated guess on what the FCC was going to do because we knew it wouldn't be good.

We wanted their estimate on how bad it was going to be.

Item D relates to Mr. Geneen's particular concern on the exclusivity of franchises. I thought they should be responsive on that.

Q. Had those three particular items been discussed at the November 2, 1965 meeting?

A. It is my recollection that all three were discussed.

Q. Did the final reaction of these regulatory agencies on these three items give you concern on November 2, 1965?

A. Did the final action?

[953] Q. Did the question of what the final action would be by these regulatory agencies concern you at the November 2, 1965 meeting?

A. We were very much concerned at that time on PUC and FCC.

\* \* \* \* \*

[969] TESTIMONY OF JACK H. VOLLBRECHT

Q. Mr. Vollbrecht, around the end of December, 1965, FEC and the CATV committee were trying to arrive at a "go-no go" decision on ITT's further expansion in CATV; is that correct?

A. Yes.

Q. Why did you at that time inform Mr. Geneen that you were aware of the need for cooperating with ABC in arriving at such a decision?

[969-a] A. I don't recall—

Mr. COHN. I object. That assumes that there is either a document which says this or the witness has previously testified to this fact. There is no foundation whatsoever for this question.

CHIEF HEARING EXAMINER. I don't think the witness is going to be mislead. I will overrule the objection. Let him answer if he can.

The WITNESS. I am sorry. You will have to ask me again.

Mr. GORDON. Would the reporter please read it.

CHIEF HEARING EXAMINER. Read it please.

(The reporter read the record.)

The WITNESS. I couldn't have said anything like that.

By Mr. GORDON:

Q. Why did you inform Mr. Geneen that you were going to have ABC audit your decision in the matter?

Mr. COHN. I object, Mr. Examiner, unless the witness is either asked prior questions to lay a foundation for this or shown documents relating to this.

CHIEF HEARING EXAMINER. If you did take that action, sir, let the question be modified accordingly and you may answer.

The WITNESS. The only recollection I have is a memorandum that I wrote to Mr. Geneen in which I referred to reference to ABC. This was prospectively in anticipating that they would come aboard, that we would simply check with them as we [970] would with any company in this system that would have an interest in this area or potential interest. But at no time was ABC ever——

By Mr. GORDON:

Q. Excuse me. My question is why he informed Mr. Geneen that there would be need to audit ABC's decision.

Mr. COHN. Mr. Examiner——

CHIEF HEARING EXAMINER. We can't have these interruptions of counsel.

Now, Mr. Gordon, complete your question and then I will hear you, Mr. Cohn. Please don't interrupt counsel as he is attempting to clarify his question.

Mr. COHN. Mr. Examiner, it is Mr. Gordon who is interrupting the witness. I suggest that the witness be permitted to complete his reply.

CHIEF HEARING EXAMINER. The witness was not responsive and for that reason Mr. Gordon interrupted him.

Proceed, if you would.

The WITNESS. Sir, I am afraid I don't understand what his question is if I am not responsive to it.

CHIEF HEARING EXAMINER. Very well. If you will restate it, sir.

By Mr. GORDON:

Q. I was simply asking in connection with your advice to Mr. Geneen that you were going to have ABC audit your decision

[971] to go or no go in the CATV field and inquiring why you felt the need to have ABC audit your decision?

A. The ABC people have an expertise in broadcasting, in the communicating field. When and if they did come aboard we would be interested in having them check our check list to see if it made sense to them. This was important to us.

Q. Do you know that ABC was not in CATV at all at that time?

A. I didn't know anything about ABC.

Q. Actually, you did not know when ABC would come aboard the ITT family?

A. No, not specifically, although we all anticipated it would be coming aboard within a matter of weeks or months.

Q. So, you were going to suspend any ITT action into CATV until you could get ABC's audit of your decision?

A. No, sir. Not at all.

Q. I thought that is what you told me.

A. This is a business problem that we were dealing with. Anytime that intelligence to the problem would have been available to me I would have been interested in it.

Q. Are you acquainted with the six CATV systems that ITT presently has an interest in?

A. Yes, sir.

Q. What are the channel capacities of the different systems?  
[972] A. I wouldn't know those answers. I don't have that kind of information.

CHIEF HEARING EXAMINER. Very well, sir, proceed.

By Mr. GORDON:

Q. Do you have any reason to believe that any of those systems can pick up more than 13 channels and deliver?

Mr. COHN. I object. The witness stated he doesn't know.

CHIEF HEARING EXAMINER. I think he is indicating that he does not.

The WITNESS. I would not know that out of hand.

By Mr. GORDON:

Q. Do you know from what areas any of the CATV systems, any of these six systems, picks up signals?

A. Other than knowing the location of the systems where their signals are coming from, I wouldn't want to answer that offhand. I would have to go back and check.

Q. Have you seen any documents at any time indicating that any of those systems are faced with so much extra capacity to pull in signals from different areas that they have a problem as to which ones to choose?

A. No. That doesn't strike me as anything I have been concerned about.

Q. Yet you are the man who was Mr. Geneen's right-hand man to look into the operations and the conduct of these systems?

[973] A. That is correct.

Q. Now you have testified that you did not inform Mr. Geneen that in connection with your "go-no go" decision you were aware of the need of cooperating with ABC? Now, let me show you this document J-126 and does this not state in that document—this is a document bearing your typewritten signature and addressed to Mr. Geneen, dated December 28, 1965, J-126.

Does it not state therein in paragraph 2, "We are aware of the need of cooperation with ABC and plan to work out the details of this as soon as our internal planning has been completed." Is that stated in this document?

A. That is correct.

Q. At that time in the same document you stated on page 2, item C, "We have not yet been able to satisfy ourselves on a go-no go decision. We expect to do this within the next two weeks." Is that stated in the document?

A. That is right.

Q. I ask again, Mr. Vollbrecht, why did you inform Mr. Geneen that you felt you were aware of the need to cooperate with ABC on your plans on CATV?

A. I thought I answered that. I had no sense of need to cooperate with ABC at that time and I did not. I did feel a need or requirement on me to cooperate with the company when and as it became part of the system. But I did [974] not have anything to do with ABC at any time. And I have not had. I have never discussed this problem with them.

Q. Did you discuss this problem with Mr. Geneen about



what the effect of ABC would be on ABC-ITT operations and plans?

A. No, sir.

Q. Never discussed it at any time?

A. Not to my recollection. In fact, I had nothing to do with ABC. My whole approach to ABC was strictly on the merits of CATV.

\* \* \* \* \*

By Mr. FITZPATRICK:

[979] Q. Showing you what has been received as Justice Exhibit 134 and directing your particular attention to paragraph 18 thereof, wherein Mr. Geneen in a memo, I believe it is, to Mr. Jack Guilfoyle states that he was going to ask Jack Vollbrecht to keep his eye on it for me, namely, the CATV activities of ITT at the time. Is that the date that you were put in overall charge of the CATV activities?

A. No. This was the date I was instructed to investigate it for Mr. Geneen, but I didn't take charge of it at that time.

Mr. COHN. Pardon me, Mr. Fitzpatrick. Which number did you say?

Mr. FITZPATRICK. J-134.

By Mr. FITZPATRICK:

Q. How much later than the date of October 27 were you put in charge?

CHIEF HEARING EXAMINER. What is your best estimate, sir? If you will give us that.

By Mr. FITZPATRICK:

Q. A question of a week?

A. No, I would say it was around the first of the [980] year when I really felt I had enough background on this to assume that responsibility.

Q. Let me ask you this question: Were you furnished a copy of this memorandum of Mr. Geneen to Mr. Guilfoyle at or about October, 1965, so that you would know what was going on in the family, the ITT family, with respect to CATV?

A. Yes, I am sure I had a copy of this.

Q. Directing your specific attention to paragraph 8 of that memorandum and it states:

The interconnecting communications carrier is a very interesting field in the sense of giving a key position in

relation to any later advertising, et cetera. In some respects it may be a key area in that it would put you in a position of representing in the marketing field CATV operations that we do not own. I would like to see more of what this consists of.

Did you do any work in helping to answer this question of Mr. Geneen as to this interconnecting matter?

A. No, sir.

Q. You did not feel that that problem had been put in your jurisdiction?

CHIEF HEARING EXAMINER. The answer is no?

The WITNESS. No.

By Mr. FITZPATRICK:

Q. Did you have any discussions with Mr. Guilfoyle, [981] Mr. Chasen, or any other officers of ITT or its subsidiaries with respect to this question of an interconnecting communications carrier at any time?

A. No, sir.

Q. Now, sir, did you attend a meeting that was held on November 2, 1965, that had as its general subject matter the CATV activities of ITT?

A. Yes.

Q. In what role did you attend that meeting?

A. As Mr. Geneen's executive assistant.

Q. What was the purpose of the meeting as announced in advance?

A. To check where we were in CATV and decide what to do about keeping going or taking another look.

Q. Let me just ask you: As of November 1, 1965, what exactly was your function as executive assistant to Mr. Geneen?

A. I was available for assignment to whatever tasks he thought were important at the time.

Q. You were a trouble shooter, in effect?

A. Yes.

Q. Now, prior to the November 2 meeting, did you discuss with Mr. Geneen the CATV problems then facing ITT?

A. I don't recall discussing it other than his telling me he wanted me to get into this. It was that kind of brief [982] discussion.

Q. To the best of your knowledge, who briefed Mr. Geneen, if anyone, prior to the November 2 meeting?

A. I don't know that. I have no idea.

Q. You did not?

A. I did not.

Q. Now, sir, will you tell us to the best of your recollection what the subject was at the November 2 meeting, what decisions, if any, were made at that meeting?

A. The subject matter was a review of where we were in the CATV business at that point in time and whether we were doing well or whether we were having problems. Out of the meeting it became obvious we were having problems in the operation of those systems.

Q. Was it discussed at that meeting what the problems were?

A. Yes, the problems of getting the systems constructed, Federal regulations, and regulatory problems that were coming up, both Federal and State, problems of operating the systems, the quality of people who were operating the systems as partners or part-owners of the system with us. Just about every aspect of the operation that you would expect to come up.

[983] Q. Was any decision reached at that meeting?

A. Only to stop until we had had an opportunity to make a more thorough investigation.

Q. Was there a freeze in effect imposed?

A. Yes.

Q. Did that freeze constitute no further commitments by ITT but carrying out the commitment already made in the CATV field?

A. That is correct until we reviewed the whole subject matter and understood what we were doing.

Q. Now who was to do that review?

A. I think there were probably several assignments to that end. I certainly had one, which was to independently audit the whole activity. Mr Chasen was instructed to review in depth his own activity.

I am certain of those two assignments coming out and they were independent of one another.

Q. Now let me ask you this. At the November 2 meeting was any decision made as to when a decision would be made on the "go, no-go" status that was created?

A. No, sir.

Q. Now, sir, directing your attention to the document concerning which Mr. Gordon has questioned you and that is J-126, which is the December, I believe it is 29, 1965.

A. Is that my memorandum?

[984] Q. Yes, the memo you sent to Mr. Geneen.

A. Yes, sir.

Mr. COHN. May I hand the witness one?

Mr. FITZPATRICK. Yes.

Mr. COHN. There is some underlining but no comments, Mr. Examiner.

Mr. GORDON. Excuse me, I will pull one out from the folder.

By Mr. FITZPATRICK:

Q. Do you have that before you?

A. Yes, sir.

Mr. GORDON. Excuse me, I would like to get a copy of that which is not so underlined.

By Mr. FITZPATRICK:

Q. Directing your attention to page 2, Roman Numeral II, where you are talking there in terms of the instructions that Mr. Geneen had given at the November 2 meeting to stop any new investments until we could justify additional ITT investment in this type of business.

A. Yes, sir.

Q. And then you go on to say, "We have not yet been able to satisfy ourselves on a 'go, no-go' decision" and that you expected to do this within the next two weeks.

A. Yes.

Q. Was such a decision reached within a two-week period [985] from the time of the writing of this memorandum?

A. Yes. That was the meeting of January 5.

Q. What decision was made at the meeting of January 5?

A. That we should not go forward.

Q. At all?

A. At least not at that time.

Q. Now directing your attention to the last page of your memorandum and more particularly that subdivision entitled "Inter-company cooperation."

A. Yes.

Q. Mr. Gordon has directed your attention to this previously?

A. Yes.

Q. It says there "We are aware of the need of cooperation with ABC and plan to work out the details of this as soon as Internal planning has been completed".

A. Yes.

Q. What did you mean by "Internal planning has been completed"? What is that that you were referring to?

A. The planning of our own, how we were going to proceed in CATV.

Q. By that did you mean your own decision on the "go, no-go"?

A. Yes.

\* \* \* \* \*

[987] Q. What do you mean by a checklist? Wasn't the "go, no-go" decision you go into CATV or you stop in CATV or was it something else?

A. The checklist was the standard I guess you would call it that we would try to identify to determine how you knew whether you had a good system, whether you should go forward or not.

Q. Now did you reach a decision to not go forward at all or did you reach a decision to go forward only if certain criteria were met by applicants for CATV?

A. We reached a decision at that time that the operation we already had had enough problems in them, we had better pay attention to those rather than worry about acquiring some new ones.

Q. Therefore, it was not necessary to apply criteria to any new proposals was it?

A. That is right.

\* \* \* \* \*

[988] Q. But you never had any occasion to talk with anybody at ABC?

A. No, sir, never.

Q. To your knowledge, was anybody at ITT engaging in CATV activities consulting with ABC on that matter?

A. Not that I know of.

Q. Did you make any attempt other than direct contact with ABC to determine whether they had taken any position on CATV activities, let us say, before the Federal Communications Commission?

A. I didn't know anything that ABC was doing at any time.

\* \* \* \* \*

By Mr. COHN:

[994] Mr. Vollbrecht, will you tell us, beginning with the meeting of November 2 what your attitude and what your opinion of CATV was?

A. Bad.

Q. Please be more explicit.

A. The November 2nd meeting was really my first exposure to it. It was obvious from the discussion at the meeting that there were some pretty serious problems about our operation of the CATV systems we had already invested in.

My own personal investigation subsequent to that time confirmed that it left something to be desired and the whole activity didn't appeal to me as something for ITT.

Q. Why would this be an activity which would not be suitable for ITT in your opinion?

A. Fundamentally, the systems are local and they gain nothing from ownership of several systems. There was no—commonality of ownership didn't add anything to any single system.

Each of them was very small. It took a lot of management time. It seemed to me it would be too much distraction of time for the possible benefits to be derived from that kind of business.

Q. Dissipation of management's time?

A. Yes, sir.

Q. Now, did you prepare an evaluation grid in connection [995] with CATV?

A. Yes, sir.

Q. Will you tell the Examiner the nature of that evaluation grid and what was its purpose and why you prepared it?

A. The purpose was to set down the criterion for making a decision on whether or not a potential system would be attractive for investment.

Q. Was this an objective kind of evaluation grid or did you make it easy or tough? Or what criteria did you use?

Mr. GORDON. I object to the form of the question.

CHIEF HEARING EXAMINER. I will sustain the objection.

Mr. COHN. I will withdraw the question.

By Mr. COHN:

Q. Did you have any particular motive in terms of direction or purpose of the evaluation grid?

A. The purpose of it was to shut off acquisition of systems. It was so tight that nothing would fit it.

Q. At that particular time when you were executive assistant to Mr. Geneen, what was your role insofar as CATV is concerned in that particular capacity as executive assistant to Mr. Geneen?

A. I really spoke for Mr. Geneen. As to CATV the people responsible for that operation had to come through me in order to get to Mr. Geneen.

Q. Could any new development take place in CATV without [996] your prior approval?

A. Not as a practical matter.

Q. Has your attitude towards CATV changed since the November 2 meeting that you described as one where you had an attitude of "bad" towards CATV?

A. No, sir.

Q. It remains the same?

A. Yes, sir.

Q. Would you look at the 126 document that has been left in front of you?

A. Yes.

Q. I direct your attention to Page 2, Paragraph Roman Numeral II, capital "B". Why was one of those sentences, namely "Therefore the total commitment level is frozen at six million in six separate systems as per attached recap", underscored?

Why was that sentence underscored, the only sentence in the entire document which is underscored?



A. Because I wanted to be sure Mr. Geneen read that sentence because he had asked me specifically whether I was sure we in fact had stopped investment.

So, I underlined it to be sure he didn't miss it.

Q. I direct your attention to the preceding sentence which reads "Since November 2"; why are you referring to November 2 in the preceding sentence where you say, "Since [997] November 2 a commitment of one million [625] to Alabama Cable Corporation has since been scratched due to the pullout of Alabama TV from their side of the bargain"?

Why do you date that back to November 2?

A. That is the magic date on no investment.

Q. I direct your attention to Paragraph Capital "A" which reads "In the CATV meeting on November 2", and I emphasize these words, "your instructions were to stop any new investments".

Did you consider Mr. Geneen to have given you any instructions on November 2 to stop any further investments in CATV?

A. Yes, sir.

Q. You were fulfilling his orders?

A. Yes, sir.

Q. Was there a difference of opinion between you and Mr. Chasen as to the role of ITT in CATV?

A. Yes.

Q. What was that difference in opinion?

A. Mr. Chasen looked on this business as a means for FEC to build systems, construct systems. Because all the money that was going into these systems was our money, I felt that we had an obligation also to operate them.

This is where Mr. Chasen and I were in conflict. This obligation to operate them is why I think it is a bad business.

\* \* \* \* \*

[1013]

#### TESTIMONY OF STANLEY LUKE

Q. Now, in 1963, ITT became interested in some television properties of the Gross Telecasting Company, is that correct?

A. It was the other way around. Gross Telecasting Company came to us.

Q. I was not trying to establish who had the initiative there but is the answer yes to my question, that ITT also had some interest?

A. Yes.

Q. Did ITT cause some evaluation studies of Gross Telecasting to be made in its behalf in 1963?

A. We took a look at it, ourselves, my staff.

Q. Did you not also request Kuhn, Loeb to make a study, an evaluation study for you on Gross Telecasting?

A. I asked Kuhn, Loeb to give me an opinion on Gross Telecasting.

Q. They did give you such an opinion?

A. That is correct.

Q. ITT also sent out one of its engineering, a Mr. [1014] Kendoyen to examine the physical plant of the Gross Telecasting Company?

A. I sent him out. He worked for me.

Q. At that time, you were under the jurisdiction of Mr. John Graham, were you not?

A. Precisely.

Q. Mr. Kendoyen went out to Lansing and looked at the properties and made a report; did he not?

A. That is right.

Q. His report was favorable? Is that correct?

A. In general, that is correct.

Q. Did Mr. Graham instruct you to go out and talk to Mr. Gross at Lansing?

A. No. I went out on my own.

Q. When was this? Can you tell us?

A. This was in October 1963.

Q. Did you meet with Mr. Harold Gross in Lansing at that time?

A. Yes, I did.

Q. Did you discuss the possible acquisition of Gross Telecasting Company by ITT with Mr. Gross?

A. Yes, I did.

Q. Was any price mentioned as a possible price for acquisition by ITT?

A. Mr. Gross had a proposal which they had made to us [1015] through their broker.

Mr. WHIPPLE. May the reporter read back the answer?

CHIEF HEARING EXAMINER. Read it please.

(The pending question was read by the reporter.)

By Mr. GORDON:

Q. And what was that proposal?

A. Roughly they were asking approximately \$13 million for their business.

Q. What was your reaction?

A. I listened to what they had to say.

Q. You made no comment?

A. Of course I commented. And I told them I would take it under consideration but the thing never got off the ground.

Q. You did come back to New York and discuss Mr. Gross' proposal with Mr. Graham, I take it?

A. That is right and I couldn't get any interest on his part.

Mr. GORDON. I move to strike the part of the answer after "That is right".

CHIEF HEARING EXAMINER. It will be stricken.

Mr. GORDON. It was not responsive.

By Mr. GORDON:

Q. Did you met with Mr. Gross in New York?

A. Yes, I had lunch with him one day in New York.

Q. You had one meeting?

[1016] A. I think it was one meeting.

Q. Who else attended that meeting?

A. I believe that Jack Graham attended that meeting.

Q. Did you again discuss possible acquisition of Gross Telecasting by ITT at that luncheon meeting?

A. Mr. Gross was interested in becoming a part of ITT if we were interested.

Q. Now, in 1963, were there any counter suggestions made by ITT to Mr. Gross as to the terms and conditions under which ITT might wish to purchase the property?

A. Never. I was just listening to his proposal.

Q. There was never any communication from ITT's end to Mr. Gross on his proposal?

A. I never recall making any proposal to Mr. Gross whatsoever.

Q. I am not talking now at this point about a formal proposal. I am asking for a reaction, a reaction communicated by ITT to Mr. Gross, to his proposal.

A. My only reaction to Mr. Gross was that I was interested and I would discuss it with my associates.

Q. Is it your testimony that no communication was made to Mr. Gross as to ITT's feelings about purchasing this property?

A. I told him that I was interested, that I would discuss it with my associates, and I would see if I could generate any interest.

[1017] Q. Is it your testimony that Mr. Gross in 1963 was left completely in the dark as to whether ITT was really interested in buying his property?

A. No question about it.

Mr. WHIPPLE. I don't think he has to make a characterization of the witness's previous answer.

CHIEF HEARING EXAMINER. Do you have an objection, sir?

Mr. WHIPPLE. Yes, sir.

CHIEF HEARING EXAMINER. You have to proceed by motion and objection.

Mr. WHIPPLE. I would like to object to the question because I don't think it is a fair characterization of the witness's previous answer.

CHIEF HEARING EXAMINER. I will overrule the objection. I see nothing unfair with it.

Proceed.

Mr. GORDON. Will you read what he did answer so far?

The WITNESS. I didn't finish my answer.

Mr. GORDON. You will get a chance. I just want to know what you said up to now.

(The record was read by the reporter.)

The WITNESS. I want to finish my answer.

By Mr. GORDON:

Q. Excuse me, I think you have given the answer.

A. I haven't given the answer.

[1018] CHIEF HEARING EXAMINER. Just a moment. You have answered the question. Counsel will proceed.

By Mr. GORDON:

Q. Did there come a time in 1964 when ITT communicated its views to Mr. Gross as to whether it wished or did not wish to buy his property?

A. I don't recall any communication with Mr. Gross in 1964. The matter just died.

Q. Well, ITT itself though was still considering the possibility of acquiring Gross Telecasting in 1964, was it not?

A. Not to my knowledge.

Q. If it is the case when did ITT lose interest in buying Gross Telecasting?

A. Other than myself, I never could generate any interest in Gross Telecasting.

Q. I take it then from your testimony that you, yourself, had a favorable reaction to buying Gross Telecasting?

A. My job was to be in a position——

Q. Will you answer the question?

A. I am answering it.

Q. Did you have a favorable reaction to ITT buying Gross Telecasting?

A. My reaction to Gross was——

CHIEF HEARING EXAMINER. Either you did or did not. Will you answer categorically and then you can explain.

[1019] The WITNESS. My reaction was favorable to Gross. My problem was to get somebody else in ITT who viewed it the same way which was impossible because no one else was interested except me.

My interest in it is the same as it was with other companies that come into ITT. I have to be in a position that if ITT decides to go forward, I don't want to be placed in the position where someone can say to me, "Is this company off the hook?"

[1020] CHIEF HEARING EXAMINER. Sir, we can't have speeches.

Mr. GORDON. I move to strike everything after his reply that "My reaction was favorable."

CHIEF HEARING EXAMINER. Let me caution the witness to be strictly responsive. If the matter is to be developed your counsel will take care of that later.

By Mr. GORDON:

Q. I show you Document J-155, a memorandum from you to Mr. Graham dated October 21, 1963. This is a copy of the memorandum you prepared around that date?

A. That is right.

Q. There you state "We will pay \$13 million for Gross which represents \$32.50 per share" and just preceding what I have just read you state, "For your information the proposed terms of the Gross acquisition are set forth below."

Is that stated in your memorandum?

A. Yes.

Q. On or about the same time or a little earlier, in September 1963, a comparison was made as to Gross Telecasting and travelers by ITT was it not, showing you Document J-152?

A. That is correct.

Q. E.E.J.G. is who?

A. Mr. Gurley who works for me, G-u-r-l-e-y.

Q. Did you request Mr. Gurley to prepare this chart?

A. Yes.

[1021] Q. Things got to a point in October 1963 that a draft of a purchase offer was prepared by ITT, isn't that correct? And I show you J-154.

A. This represents a draft of a preliminary agreement, that is right.

Q. Did you ever exhibit this to Mr. Gross?

A. I took it with me when I went to see Mr. Gross. The purpose was to show him how we go about doing these things assuming we wanted to do it.

Q. I am afraid you haven't answered my question. Maybe you have implicitly. You did show it to Mr. Gross?

A. That is right.

Q. From your discussions with Mr. Gross it was important to him to be assured of some role in ITT if, as and when Gross Telecasting would be sold to ITT?

A. His broker proposed that in his letter to us. That was his idea.

Q. Did Mr. Gross ever discuss that with you personally?

A. Mr. Gross discussed with us that he would like to have such a role.

Q. Was there any reaction on the part of ITT?

A. Completely negative.

Q. When was that completely negative reaction communicated to Mr. Gross and by whom?

A. By myself.

[1022] Q. When did you tell him that ITT had a negative reaction?

A. I told him that at my meeting with him in October and again at our luncheon.

Mr. FITZPATRICK. Can we fix the year, Mr. Examiner. October can be any year. I assume it is 1963.

The WITNESS. 1963.

By Mr. GORDON:

Q. What is this role that Mr. Gross wanted and you state ITT did not approve of?

A. He followed up his broker's letter on the basis that he wanted to be the key man if we were interested in acquiring TV stations.

Q. Which brokers' letter are you referring to?

A. Mr. Deutsch.

Q. Do you have a particular letter in mind?

A. He wrote me a series of letters. In this letter he mentioned that Deutsch would not be interested unless some arrangement could be made.

Q. Excuse me. I simply asked you to identify a particular letter that you are referring to. Can you identify that letter?

A. If I go through all the exhibits I think I can find the letter.

CHIEF HEARING EXAMINER. Approximately when did you [1023] receive it and what was the substance of it?

Mr. COHN. Mr. Luke, the Examiner has asked you a question. Please reply to it.

The WITNESS. The letter was received in 1963.

CHIEF HEARING EXAMINER. What part of 1963?

The WITNESS. The middle of 1963.



Mr. Deutsch said that Mr. Gross would be interested in some kind of arrangement with ITT provided he could have a larger role in the purchasing of other TV stations.

\* \* \* \* \*

[1032] Q. Is it your testimony that after the Board formally approves a definitive contract, which in the ABC case took place in February, that it is only then that ITT and your team starts getting detailed financial information on the acquired company?

A. That is right.

Q. How do you decide in your negotiations with the to-be-acquired company what price to pay them if you are lacking [1033] this detailed financial information?

A. The answer is that we make our decision based on preliminary information and then we have the right to walk away if they don't meet certain financial tests which I write into the formal contract. It is an option, that is what it boils down to.

We take an option on the company, we look it over and we ask for material contracts and we ask for matters of taxes and we ask for a whole series of schedules.

We have a period of time that we look at these schedules. Then we put a net worth and a net income test in there. If they don't meet these tests, then we have a perfect right to walk away.

Q. All this was done in connection with ABC?

A. Exactly.

\* \* \* \* \*

[1035] Q. Well, this document is in the record and we don't have to get into all of the details. But is it your testimony then, or is it a fair statement that all of the conditions of the contracts as to the obtaining of information by ABC from ITT and from ITT by ABC—I may have them mixed up but from one party to the other—were complied with in the ABC acquisition matter?

A. It is my testimony that we chose not to walk away from the deal with ABC.

\* \* \* \* \*

[1040] Q. You were satisfied after investigating the matters raised in paragraph "H", that there was no reason for ITT to [1041] walk away from the transaction?

A. Precisely.

Q. And when did you conduct this investigation?

A. After February 14, as the ABC people—right after the signing of the formal contract.

Q. When was your investigation concluded?

A. I would say within 60 days of that date or thereabouts.

\* \* \* \*

[1052] Q. I am still a little puzzled. Going back to Mr. Gross—I am sorry. Was Mr. Gross ever told by ITT that it was rejecting any proposal of his to buy Gross telecasters?

MR. WHIPPLE. We have been all over it.

CHIEF HEARING EXAMINER. Let him answer yes or no, and get that cleared up.

The WITNESS. It just simply died a natural death.

CHIEF HEARING EXAMINER. Just answer the question yes or no, that is all Mr. Gordon wants to know, and we will leave the subject.

What is the answer?

The WITNESS. My answer is no.

\* \* \* \*

[1058] Q. Before going to that, wasn't ITT continuing their interest in the Gross Broadcasting Company until as late as March of 1965?

A. No.

Q. I show you what has been received as J Exhibit 169 and it is a memo prepared by Mr. Fields, who worked for you.

A. Precisely.

Q. And it is addressed to you, giving information concerning Gross Broadcasting and its earnings and so on at that time. Was Mr. Fields not interested in Gross at the time he prepared this memo?

A. He prepared it at my request. We continued to get [1059] from the Gross people their annual reports, and I just wanted to see what kind of a deal it would have been had we made it and how good it would have been and whether or not it would have been a good deal for ITT.

[1060] Q. You had definitely decided that you weren't interested in Gross, but you wanted to look back to see whether you had made the right decision, is that what you are saying?

A. I wanted to look back and see whether or not if we had

made it, just what the situation would be. I just received another annual report the other day, and I am going to take another look at it. They made almost one million dollars after taxes, but we still didn't buy it.

Q. Now, sir, had there come a time within the ITT organization that a decision was made to acquire some broadcast interests?

A. I don't know of any such decision. The first time I heard about broadcasting was when a broker for Gross wrote me a letter and offered me Gross.

Q. Actually, he had written to Mr. Geneen, had he not, and Mr. Geneen had directed it to you.

A. That is right.

Q. And asked you to look into it?

A. No, it went to Graham and from Graham it came to me, and I took it from there.

Q. And who was Mr. Graham at that time? What was his position?

A. He was group vice president of ITT.

Q. And you were a member of the group?

A. Yes.

[1061] Q. Now, following the Gross negotiations, to your knowledge, was any decision made sometime in 1963 by ITT management.

A. There was never any negotiations with Gross.

Q. That is not my question, sir, and will you listen?

A. I heard your question. You used the word negotiations which is a technical term.

Q. Did I use the word "Gross"?

A. Yes, you did.

Q. Have it read back, please.

(The pending question was read by the reporter.)

Mr. FITZPATRICK. I wish you would listen to these questions.

Mr. WHIPPLE. I again renew my objection. He is putting things in the question which the witness didn't say.

CHIEF HEARING EXAMINER. Read the question.

(The pending question was read by the reporter.)

By Mr. FITZPATRICK:

Q. Was any decision made in 1963 by ITT management to interest itself in broadcast acquisitions?

A. Number one, there was no Gross negotiations. That is point one.

Q. What do you consider your conversations with Mr. Gross.

A. Discussions, period.

[1062] Q. All right. I will use your words.

A. There is a big difference between negotiations.

CHIEF HEARING EXAMINER. That is argument, and we can't have argument between the witness and counsel. I think the question is quite clear, sir, and I will ask Mr. Alderson if he will read it again, and you can think about it and answer it as best you can.

If you don't understand the question, tell us that.

(The pending question was read by the reporter.)

CHIEF HEARING EXAMINER. Tell us your knowledge in that regard, if you have any, sir.

The WITNESS. I have no knowledge of any interest on ITT's part with respect to TV in 1963.

By Mr. FITZPATRICK:

Q. Let us direct your attention to 1964. Did there come a time in 1964 where ITT management made a decision to investigate the possible acquisition of broadcast facilities?

A. I know of no such decision.

Q. Did you have any discussions with Mr. Geneen with respect to whether or not at least preliminary investigations should be made as to whether broadcast facilities might be obtained by ITT?

A. I had no such discussions.

Q. Did you have any discussions with Mr. Graham along those lines?

[1063] A. I had no discussions with Mr. Graham.

Q. Did you have any discussions with any other officers of ITT?

A. I had no discussions with Mr. Graham or Mr. Geneen or anybody else.

Q. Did there come a time—other than the Gross discussions that you had, did you have any discussions or conversations with any other broadcast licensees relative to the possible acquisition by ITT?

A. Other than Gross, I had no other conversations or contacts.

Q. At any time?

A. That is correct.

Q. Did any of your subordinates to your knowledge have any such discussions or conversations?

A. They had no such discussions or conversations.

Q. Did there come to your attention whether or not any other officials or employees of ITT were having any conversations or discussions with broadcast licensees as to acquisitions?

A. I have no such knowledge.

Q. Now, sir, directing your attention to J-186, that document, the policy guide, signed by Mr. Perry became effective on January 24, 1964, and it informed all of the ITT organization that you as the vice president and director for business [1064] development were the one to be in charge of acquisitions, is that correct?

A. That is right.

Q. Now, is that the time when your role was changed from what it had previously been?

A. No, I think it just confirmed what had been, pretty much, except in one regard, that as I have said, the job was broken down and Mr. Kenmore did the paper analyses.

Q. And it was as a result of this policy guide, is that correct, that set it up?

A. Yes, we kind of grew into it, and he was already doing it, and we kind of grew into it at that point.

Q. Now, was one of the criteria to be applied in considering acquisitions for ITT to be a high earning ratio of the company?

A. Price earnings ratio, you mean?

Q. That is correct.

A. Well, it is desirable.

Q. And was that the policy of the company to look for those kinds of companies for acquisitions?

A. It wasn't the only reason.

Q. Was it one of the criteria?

A. Yes.

Q. Now, directing your attention, if I might, Mr. Luke, to Page 2 of J-186, and your particular attention to Paragraph

[1065] 3 thereof, the second sentence, it says, "The problem of increasing the percentage of U.S. earnings was further compounded by the high rate of growth of foreign earnings".

Now, earnings is defined as what? What did you understand that to mean when you received this policy guide? Is that profits?

A. Net income after taxes, yes.

Q. And this policy statement made clear to you that ITT was then at least, if it had not in the past, undertaking a vigorous U.S. acquisition policy, is that correct?

A. That is right.

MR. WHIPPLE. Could I have the question read?

CHIEF HEARING EXAMINER. Read the question.

(The pending question was read by the reporter.)

By MR. FITZPATRICK:

Q. Now, directing your attention to Page 3 of that document where it says subsection E, if I may use that term, "We are looking at other service opportunities in the field of broadcasting, CATV and similar public communications means".

So was it not a fact that at least as of January 1964, that ITT had established the policy of seeking to acquire broadcast interests?

MR. WHIPPLE. I, Mr. Examiner, must object to this. The paper is dated 4, 13, 65. To imply it as being of sometime in 1964 is contradicted by the paper itself.

[1066] MR. FITZPATRICK. I must differ with Mr. Whipple. My document, J-186 makes it very clear that it was effective January 24, 1964.

MR. WHIPPLE. Mr. Fitzpatrick, my document has a date, and I don't know how the Department of Justice put these documents together, when they Xeroxed them, but my document shows in the last page, to which you referred, the date, 4/13, 1965.

MR. FITZPATRICK. I don't know what that means either. I will ask the witness.

By MR. FITZPATRICK:

Q. You were the man in charge of acquisitions and was this policy guide J-186 adopted on January 24, 1964?

A. I read the date to be 4, 13, 65.

Q. And you are referring to the typewritten date on the bottom of the last page?

A. That is right.

CHIEF HEARING EXAMINER. Do you have any independent knowledge aside from this document?

The WITNESS. I had no independent knowledge. Well, ITT had an acquisition policy. Your question was directed towards F on Page 3. My answer to that is that I have no knowledge of that.

By Mr. FITZPATRICK:

Q. You have no knowledge of that?

A. No, other than as I have already testified.

[1067] Q. Well, as the gentleman in charge of acquisitions, did you not know when this policy statement was issued, as to what the policy of the company was to get into broadcasting?

A. In 4, 13, 65, this statement says we were looking at service opportunities in the field of broadcasting, CATV and similar public communications media. I did not look into the field of broadcasting myself.

Q. Did your subordinates?

A. No, they did not look into CATV either.

Mr. FITZPATRICK. I think that we have to get some clarification on this record, Mr. Examiner, of the document J-186.

Mr. WHIPPLE. May I speak to that?

CHIEF HEARING EXAMINER. Can't that be done off the record informally during the luncheon recess and it would save this discussion.

Mr. WHIPPLE. It is apparent on the fact of the document and I can explain it.

CHIEF HEARING EXAMINER. Very well.

By Mr. FITZPATRICK:

Q. Directing your attention to J-187, and a copy of that document which has been furnished to me is J-187, it bears the date of March 15, 1965.

A. I don't have J-187.

CHIEF HEARING EXAMINER. Is there a question?



[1068] By Mr. FITZPATRICK:

Q. Did you prepare this, sir?

A. I did not, I have never seen this before.

Q. Other than the Gross discussions that you conducted yourself, Mr. Luke, did there ever come a time when you learned that ITT had some interest in acquiring broadcast stations?

A. I did learn that there had been some discussions with travelers, I believe in Hartford, Connecticut, with respect to a station up there.

Q. But these were not conducted by your group?

A. They were not.

Q. Is it a fact that under the present acquisition policy, that your group doesn't enter into the picture until the initial contract is signed with the company to be acquired?

A. I negotiate the preliminary agreement, and that is the point where my staff and myself come into the situation.

Q. Now, in negotiating as you have testified, do you have made available to you all of the preliminary studies and reports made by ITT personnel?

A. Yes, I can get the file, whoever has it, yes.

Q. Is that the practice?

A. Yes, it is a practice.

\* \* \* \* \*

#### TESTIMONY OF ROBERT H. KENMORE

[1097] Q. You prepared a number of reports dealing with the television industry during this period, didn't you?

[1098] A. Yes.

Q. For example, Mr. Kenmore, did you prepare the attachment to J-209?

A. Yes, I did.

Q. Your name is not on it, I see, but you prepared it?

A. Yes, sir.

Q. This was mid 1964 or the summer of 1964. There you also refer to the high quality of television broadcast earnings which would make such properties extremely attractive to ITT?

A. Correct.

Q. You stated that television broadcasting operations are essentially a cash business.

Mr. WHIPPLE. Mr. Kestenbaum, are you reading from the document? Would you mind identifying the page if you are so that I can follow you?

Mr. KESTENBAUM. I am on Page 5 of the document.

By Mr. KESTENBAUM:

Q. The next sentence, "Revenues of such properties have shown consistent non-cyclical growth characteristics which are expected to continue at the rate of approximately 10 percent a year for the foreseeable future".

That was your conclusion at the time, was it not?

A. Right.

Q. I take it it was, too, your conclusion when you prepared J-238 which was the document in that bound volume that [1099] we discussed a moment ago?

A. Well, not exactly. Up to now, we have been talking about the television industry in the broadest sense of the word. J-238 refers particularly to one company in the industry.

Q. Yes. On the first page of J-238, you state that "For about two years, we have been intensely researching the broadcasting industry and closely following all developments that might lead to possible acquisition because of our belief that this industry represented one of the most attractive fields for potential ITT entry".

I take it the characteristics we have just been discussing are what make up this attractiveness?

A. Yes, these were some of them, that is correct.

Q. On Page 2 of J-238, you refer to the acquisition of ABC as "a unique opportunity to add some \$20 million of fast-growing service income in the United States. Such a large increment of earnings in a field that is considered readily compatible with our basic communications operation is not often available".

A. Right.

Q. What did you mean when you referred to the compatibility of the acquisition with the company's basic communications operation?

A. That was one of the advantages I mentioned before, of fitting in with the image of ITT favorably. We were a [1100-01] communications company. ABC was regarded as a communications company. So it was compatible in that sense.

Q. The sentence I read a moment ago referred to two years of intense research into the broadcasting industry and as close following of all developments that might lead to possible acquisitions. Could you describe to me what that research and what the possible acquisitions consisted of during that two-year period?

A. The research consisted primarily of keeping up-to-date files on various companies in the industry and following brokerage reports that were issued on the industry. Generally following developments in the industry from press and published documents that the companies issued.

Q. Did you also employ brokers?

A. No—I am talking about stockbrokers, not business brokers.

Q. The various brokerage reports—I should not ask you about the record as a whole. The brokerage reports you got then were made available to you under special contract or were they available to any clients of the particular brokerage houses?

A. We get flooded with brokerage reports from all sources all the time on all industries.

Q. How about the two documents on the back of J-238?

A. These were prepared on special contract at our request [1102] by Kuhn, Loeb and Roth Girard.

Q. Were there any other documents given to you by Roth Girard and prepared under special contract?

A. This was the only one. Roth Girard prepared other studies for us on what was going on in the industry but it was not under a special contract of any kind.

Q. Was Mr. Girard a consultant specially employed by you to study this matter?

A. At one time he was a consultant to us but I am not sure of the dates. Aside from that——

Q. Was this in connection with the ABC acquisition or an earlier period?

A. I told you I don't know when he was a consultant to us. I have known him for many years. His work was available to anybody.

Q. Was he regarded as one of the most expert financialists in the broadcasting field?

A. Yes, I think he is one of the best-qualified analysts and seems to be regarded as such by many other sources.

Q. How did you go about the second aspect of this sentence that I read earlier "Following all developments that might lead to possible acquisition"?

A. I think this was a general way of stating that at various times people had brought acquisition ideas to us in this field and we reviewed them.

[1103] Q. Did you ever employ a consultant to go out and find one for you?

A. No, sir. Not to my knowledge.

Q. Did you ever have dealings with a Mr. Howard Stark?

A. I have met Mr. Stark, yes.

Q. How did that meeting come about?

A. I don't recall. I think he was a friend of Mr. Witting.

Q. I show you J-179, which is a letter to you from R. C. Crisler and Company, September 10, 1964. Do you recall receiving that letter?

A. Right.

Q. In the first paragraph of that letter Mr. Crisler reported to you that he had asked you or a Mr. Dutton whether your company might be interested in a relatively small market television station and your answer was that you had to start somewhere and that if it was good enough, you certainly would be interested.

Was that correct statement on September 10, 1964?

A. I don't recall but I am sure I would not have discouraged him from sending in anything he was aware of in the field.

Q. What offerings did you discuss with Mr. Crisler?

A. At the time?

Q. At that time or thereafter.

[1104] A. I don't recall.

Mr. WHIPPLE. Mr. Examiner, there is no foundation for the question. Cannot the witness be asked if he discussed an offer. The question assumes there was an offer.

[1105] By Mr. KESTENBAUM:

Q. Do you recall discussing a proposed sale of a station to ITT with Mr. Crisler?

A. I see he writes me about WATE. I don't recall whether I discussed it with him or not.

Q. Do you recall ever discussing that with someone else in ITT?

A. I think I discussed it with Mr. Perry but I don't recall the details.

Q. Let me show you a memorandum J-178 and see if you have seen that before.

A. I saw it in Business Week.

Q. Earlier?

A. No, I don't think I ever saw it earlier than that.

Q. The document states on it, "Will you please show him this"—I take it that "him" may be Mr. Geneen—"and advise Kenmore."

Were you advised about the content of this memorandum?

Mr. WHIPPLE. I object to the form of the question. It is an assumption that Mr. Geneen was shown this. Will you please clarify.

CHIEF HEARING EXAMINER. Will you do that, sir?

By Mr. KESTENBAUM:

Q. You tell me, sir.

Mr. WHIPPLE. Is there a question pending?

[1106] By Mr. KESTENBAUM:

Q. Will you tell me to whom the signatory of that memorandum directed that the memorandum be shown?

A. I really don't know.

Q. Did it direct that it be discussed with you?

A. I see it says "Advise Kenmore."

Q. Were you advised?

A. I really don't recall.

Q. You mean you don't recall the statement by Mr. Witting that "WATE looks good at, say, 15 times earnings."

A. No, sir, I don't.

Q. You don't recall the statement by Mr. Witting that perhaps we should build our own if HSG wants to?

A. No.

Q. Following that sentence there is a parenthetical, "Gross, Hartford, Knoxville, etc". Will you tell me what "Gross, Hartford, Knoxville" means?

A. I believe those refer to individual stations, Gross in Lansing I believe, Hartford was a station and Knoxville—I think someone suggested a station in Knoxville. Is that WATE? Then that must be the one.

Q. There is a reference in there to the Whitney group. Do you know anything about that?

A. I think that is Corinthian.

Q. What does it say?

[1107] A. It says since Whitney group looks dead, perhaps we should build our own if HSG wants to. This is the Witting scribbled to Hart Perry.

Q. What would you assume it means or what do you believe it means when it states that "The Whitney group looks dead"?

Mr. WHIPPLE. Mr. Examiner, I am sorry to do this but this calls for speculation on the part of this witness who said he never saw the document. It appeared in Business Week.

He is now asked to speculate on what a document written by Mr. "A" to Mr. "B" says.

Mr. KESTENBAUM. If he has no knowledge he can say he has no knowledge or any opinion. This is an intra-corporate memorandum.

CHIEF HEARING EXAMINER. I don't think any unfair advantage is being taken of the witness. I overrule the objection. As counsel says if he doesn't know I am sure he will tell us promptly.

The WITNESS. I assume that "The Whitney group looks dead" means that it looks dead, that they are not interested or we are not interested. I mean that there is nothing cooking here.

By Mr. KESTENBAUM:

Q. What is the date of that Witting paper, sir?

A. There is a date here 9-18-64.

Q. Here is a memorandum of your own on October 5, 1964 which states, "I have no idea where matters now stand with [1108] Corinthian."

Mr. WHIPPLE. May we have the number?

Mr. KESTENBAUM. J-176.

The WITNESS. What are you referring to here, please? I am sorry.

By Mr. KESTENBAUM:

Q. I was reading the statement which says, "I have no idea where matters now stand with Corinthian."

A. Right.

Q. Does that refresh your recollection that there were some discussions and negotiations or some sort of consideration of acquiring Corinthian?

A. I have never denied that there weren't. You haven't asked me.

Q. What did they consist of?

A. We met with the Corinthian people. I believe it was at the suggestion of Mr. Stark. We met with them I remember at a luncheon that we had with I think two of their people. This was at ITT.

Q. Could you tell us the date approximately of those meetings?

A. No, I don't remember.

Q. Did they precede that memorandum?

A. I really don't know. It must have been sometime in the fall of 1964 just based on the dates here but I just don't [1109] remember.

Q. Whatever happened to those discussions or negotiations? Do you know?

A. There were never any negotiations. There was a general discussion that I was present at where they told us something about this company and we told them something about our company.

Q. You were present in your capacity as director of acquisition analysis, were you not?

A. I was present because I was invited to attend. After that I never met with them again.

Q. I take it this was more than a social invitation? You were invited because of your position in the company?

A. I would say that is a fair comment.

Q. Did you ever follow up your reference to Corinthian in that memorandum? Or did anyone ever follow it up to you by informing you of the outcome?



A. I was subsequently advised that we were having no further conversations with Corinthian. I don't believe the company was ever seriously interested in selling.

Q. May I show you a document J-208, a memorandum from Mr. Witting to Mr. Perry, May 6, 1964.

A. Yes.

Q. There is a reference in it to Mr. Stark whom we have mentioned. It states "To get an accurate evaluation of the [1110] current values of TV and radio properties and the availability of such properties I have asked Howard Stark, who is probably the most prominent broker operating in these fields, to meet with me."

The signatory here, Mr. Witting, suggests that you and Mr. Perry attend this meeting. Does that refresh your recollection it was ITT that went to Mr. Stark and not Mr. Stark went to ITT?

A. I gather you are saying Mr. Witting went to Mr. Stark?

Q. Was Mr. Witting an interloper here at this time?

A. No. He worked for ITT.

Q. What was his position?

A. He was I think in charge of North American staff.

Q. Was he a vice president of the corporation?

A. Yes, I believe he was.

Q. Was he an executive assistant to the president of the corporation, Mr. Geneen?

A. Are you saying this is a title? I don't recall whether that was his title or not.

Q. Did he have any responsibilities in the area of TV broadcasting considering the acquisition of TV broadcasting properties?

A. Not that I was aware of, no.

Q. You were aware of it on May 1964 when he sent you a copy of a memorandum?

[1111] A. That he had a friend by the name of Mr. Stark who came to us.

Q. The memorandum says "As you know we have had several discussions from time to time as to the wisdom of acquiring TV and broadcasting properties."

A. Those discussions were not held with me.

Q. I take it Mr. Witting had some responsibilities, that is why he had those discussions?

A. I don't know.

Q. You have no knowledge of it?

A. No.

Q. Now J-338 which you might keep there since we will look at it again.

A. You mean J-238?

Q. Yes, J-238 states "While groups of independent stations or large individual stations might also be attractive our policy has not been to move aggressively in this direction until we would be convinced that none of the three major networks and their group of owned stations might be available."

Mr. WHIPPLE. If counsel is quoting from a document may we kindly have the page.

CHIEF HEARING EXAMINER. Will you announce the page, sir?

Mr. KESTENBAUM. Page 1.

By Mr. KESTENBAUM:

Q. The Witting document J-178 refers to several [1112] individual stations. You have also mentioned the meetings, several meetings with Corinthian.

A. I stated one.

Q. I beg your pardon.

A. I only met with Corinthian once. Not several times.

Q. To what extent did you look into other broadcasting groups, TV broadcasting groups?

A. As I pointed out before we were looking at all of them, keeping statistical information and keeping up on what they were doing.

Q. This was with a view to the possibility that ITT might want to acquire one of those groups?

A. If one became available we wanted to have the background knowledge to be able to judge its attractiveness, yes.

CHIEF HEARING EXAMINER. Off the record.

(Discussion off the record.)

CHIEF HEARING EXAMINER. As I stated earlier, gentlemen, we will convene in the morning in the Hearing Room "F" of the Interstate Commerce Commission. The entrance is on Constitution Avenue between 12th and 14th.

Come to order, gentlemen.

By Mr. KESTENBAUM:

Q. Mr. Kenmore, do you know of any contacts between employees or officials of ITT or persons acting on behalf of ITT with other group owners besides Corinthian?

[1113] A. No, I don't believe so.

Q. A memorandum of yours dated August 18, 1964, J-211, refers to "Storer and Capitol Cities as the most likely companies we might look at beyond Corinthian."

A. May I see the document.

Q. Right.

A. I don't think it says that. It studies the effect on the balance sheet——

Q. I don't want the description of the document. Will you please direct your attention——

A. Will you read me the words you are referring to or show them to me or something?

Q. The last paragraph of that document refers to those two companies in the manner which I just stated, does it not?

A. I see what you mean, yes.

Q. To what extent did you look at those two companies? Or did someone in your behalf if you know look at those two companies?

A. As far as I know all we did was what I described before. We kept current files on these companies and current information, got their annual report and anything that was published on them.

Q. Do you believe that any broker on your behalf looked at those companies?

A. No.

[1114] Q. If such an event would have occurred, would this have been brought to your attention?

A. It might have.

Q. To whose attention would it have been brought if it were not you?

A. I don't know what you mean. It could have been brought to anybody's.

Q. I am trying to find out who handled ITT's interest in acquiring television and broadcasting properties.

A. Within ITT, I assume it would have been brought to my attention, yes. I thought you were referring to whom he might have brought it in ITT.

Q. Mr. Witting evidently took the matter upon himself—spoke to Howard Stark on that subject in May 1964. Did you have any subsequent meetings with Howard Stark? I take it you attended the meeting to which this document referred?

A. I don't know. I know I have met Howard Stark.

Q. Did you meet with him on May 7, 1964?

A. I don't know, I don't recall. I have met him I would say two or three times.

Q. I show you a document J-222, February 4, 1965, which presents some background information on the leading TV broadcasting independent groups in the event that the ABP discussions stall.

A. Right.

[1115] Q. The ABP discussions did stall in February 1965, did they not?

A. That is right.

Q. Did you follow up any of the prospects listed in the attachment to that document?

A. Only in the sense that I have described before, of keeping up with information on these companies, published information.

Q. How do you go about going beyond keeping up with published information if your company has an interest in acquiring a firm?

Who makes that determination?

A. I would say that the determination is made by Mr. Geneen and Mr. Perry.

Q. Do you have authority on your own to follow up a possible acquisition like the one stated in this document, J-222?

A. I may have the authority but I have never done it without discussing it with Mr. Geneen or Mr. Perry.

Q. Would you say that one of the reasons why further steps were not taken in the directions indicated was the possibility that ABC would become available as an acquisition?

Mr. WHIPPLE. I don't understand the question, what he means by the steps indicated.

Mr. KESTENBAUM. I just read the document which lists [1116] the various prospects as the alternative.

CHIEF HEARING EXAMINER. I overrule the objection.

Mr. WHIPPLE. You are still referring to J-222 then?

Mr. KESTENBAUM. Yes.

CHIEF HEARING EXAMINER. Proceed.

The WITNESS. I frankly don't recall what the circumstances were, as to why what you say didn't happen didn't happen.

By Mr. KESTENBAUM:

Q. Did it happen? You told me it didn't happen. I didn't tell you, did I?

A. No.

Q. Could I show you J-227 which is a document dated 11, 22, 65 and ask if you were responsible or the author of that?

A. Yes, sir.

Q. Do you remember the circumstances when that document was prepared?

A. No, sir. I assume it was part of our continuing review of the industry.

Q. How often did you prepare a document listing comparative financial results of leading group broadcasters?

A. I don't think there was any regular pattern. I think it was based on new published information or new requests.

Q. How many industries did you follow this way, sir?

A. I don't know.

Q. Would it be fair to say that you are more closely [1117] following the TV broadcasting industry than others?

A. As of any given time, I am sure that would be fair to say. As of other times, no.

Q. Well, during 1963 to 1965, when you were intensely researching the industry and closely following all developments, how about that period?

A. We followed a number of other industries.

Q. What were some of those other industries, sir?

A. The Mutual Fund industry for one, the Small Loan industry. I really can't recall them all.

Q. Those two you have listed are industries in which ITT has made acquisitions?

A. That is correct.

\* \* \* \* \*

[1169] Q. Thank you. I show you a document, a memorandum from yourself to Mr. Geneen and Mr. Perry, dated May 17, 1966, marked for identification Broadcast Bureau No. 25, which to my shock, I received only this morning, but I have no objection to it.

It is your discussion of Neilson Ratings, sir, to your superiors.

\* \* \* \* \*

Q. In this document, you stated that prompt and imaginative action on the programing front can yield results in this business.

[1170] A. That I believe is out of context. May I have the document again?

Q. I am sorry, you were referring to the market ratings for the ABC Second Season, and you stated "The only thing this indicates to me is that prompt and imaginative action on the programing front can yield results in this business," which is a heartening thought.

\* \* \* \* \*

Q. If there were to be prompt and imaginative action by ABC, as a subsidiary of ITT, where would that prompt and imaginative action come from?

A. ABC. I don't understand the question. This was once the season started.

[1171] Q. As a matter of fact, they took this prompt and imaginative action in the period that you related as an independent unintegrated network not a part of ITT, isn't that correct?

A. That is correct.

\* \* \* \* \*

By Mr. KESTENBAUM:

Q. Without expressing agreement with everything read in Fortune Magazine, I have heard Mr. Geneen expressed as an exacting boss, and a critical executive. Do you think you would have heard [1172] about it from Mr. Geneen if there were substantial errors in J-238?

A. Can I explain my answer? If the errors were significant to what we thought was important, I believe I would have heard about it, yes.

Q. As a matter of fact, since preparing J-238, you have had a promotion, haven't you, sir?

A. Yes.

\* \* \* \* \*

[1192] Q. With respect to WATE-TV, did you in any way participate in discussions or conversations with respect to possible acquisition of that telecasting station. I believe that is Knoxville.

A. I don't think we ever met with them.

Q. Do you have any communications with them other than in person?

A. No, I think we were just dealing with Mr. Crisler.

Q. Other than the ones I mentioned and excluding ABC and CBS for the moment did you have any conversations or discussions with any other broadcast interests during the period 1964 through the time of the ABC acquisition?

A. No. I assume you are asking me whether I had discussions with the other party.

Q. Yes.

A. I was in on internal discussions within ITT.

Q. Yes. I will get to that. I am asking did you have any discussions with the parties who owned the stations?

A. No, sir, except I had lunch once with the Corinthian people.

Q. Other than your conversations with the Corinthian people did you have internal, and I use that with respect to the ITT organization, internal discussions relative to the possibility of acquiring broadcast interests.

A. Yes, sir.



[1193] Q. With whom did you have those conversations?

A. Primarily Mr. Geneen and Mr. Perry.

Q. Was that more than one conversation?

A. Yes.

Q. When was the first conversation held?

A. In early 1964.

Q. What was the substance of that conversation?

A. If I remember the subject of the Hartford station came up and was discussed.

Q. In what regard was it discussed? The possibility of acquiring it?

A. Yes, sir.

Q. Was there discussion as to its earning power and the ratio?

A. As I remember my only participation in that discussion, I would ask some questions and be told to do some research on it.

Q. Did Mr. Geneen or Mr. Perry in this conversation indicate at any time that they were interested in acquiring a group of television stations?

A. No.

Q. Did they indicate they were interested in acquiring one or more television stations?

A. It was not a broad discussion. It was just my first contact was, I believe, that you were asking.

[1194] Q. I am talking about the first meeting.

A. Right.

My part in the meeting was very short. I was just asked to get some information.

Q. What information were you asked to get?

A. Whatever I could.

Q. With respect to what?

A. With respect to Hartford.

Q. With respect to Hartford?

A. Yes.

Q. Now you held subsequent conversations with Mr. Geneen relative to broadcast acquisitions?

A. Yes.

Q. Now at any of these discussions was one of the subject matters the acquisition of one or more of the television stations?

A. Yes.

Q. When was the first conversation of this nature held?

A. I don't recall. There were a number of conversations on this subject during all of 1964 and 1965.

Q. Would it be fair to say that ITT was at least considering internally the possibility of acquiring a group of television stations?

A. There were discussions on that and studies prepared, yes.

[1195] Q. To your knowledge was any contact made with any group owners relative to the possible acquisition of their television stations?

A. No, not by ITT.

Q. To your knowledge did any brokers acting on behalf of ITT contact any group owners of television stations with respect to the possible acquisition?

A. To my knowledge not acting on our behalf. We had some unsolicited suggestions that came in.

Q. You mean from brokers of broadcast stations?

A. Yes.

Q. What action, if any, did you take with respect to these unsolicited communications?

A. The normal action putting together whatever information we could find available in submitting it to Mr. Geneen and Mr. Perry.

Q. Was any response given to these broadcast brokers as to whether or not ITT had any interest at all in possible acquisition of the stations in question?

A. No. We didn't make any acquisitions.

Q. I didn't ask you whether you made them. I asked whether you indicated to any of the brokers whether or not you were at least willing to open up negotiations looking toward the possible acquisition.

A. Not negotiations. We have a standard comment that [1196] we would give any broker in broadcasting or anything else. Let us see the facts on anything you have got and we

will take a look at it. We don't discourage people from bringing in any ideas they have.

Q. Did the brokers give you information on some of these stations?

A. Yes, sir.

Q. Was it your function to analyze them?

A. Yes, sir.

Q. Was this during the period 1964-65?

A. Yes, sir.

Q. Was any response given to the brokers as to whether ITT had any interest in acquiring any of these stations?

A. The answer was always no.

Q. What criteria did you apply in determining that you weren't interested in acquiring these broadcast facilities?

A. I assume you are asking for my personal views rather than the company——

Q. I am asking what recommendations you gave to the organization so that they could reach the decision that they did.

A. Right. My recommendation was to try to acquire, since this was a good, seemed to be a good industry, to try to acquire as meaningful participation as possible which would mean being interested in one of the two major independent [1197] networks, O and O groups.

Q. The two major independent O and O groups? Who are they?

A. ABC and CBS.

Q. You mean independent of the large corporations?

A. I am excluding NBC.

Q. Are you excluding the other large multiple owners such as Westinghouse and General Electric?

A. That would have been a second choice.

Q. AVCO and Storer?

A. They are different. Avco, had they been willing to sell off their group rather than the whole company. In other words, if one of the major companies was not available, then my recommendation would have been that a large group would have been second choice.

Q. Was any consideration given to negotiating for the possible purchase of TV stations owned by groups such Meriden Publishing or Time-Life?

A. No, other than the general studies we made on all groups there was no specific consideration given to those two.

Q. Was any consideration given to the possible entry into television by ITT, by the construction of their own UHF television station?

A. Never, to my knowledge.

\* \* \* \* \*

[1225] By Mr. WHIPPLE:

\* \* \* \* \*

Q. I direct your attention to Page 4. The third line of that table.

A. Yes.

Q. Do you see a line "Property and Equipment"?

A. That is the fourth line.

Q. The fourth line, I beg your pardon. That is Expenditures for Property and Equipment; is that correct?

A. Capital expenditures, yes.

Q. On the estimated columns, that is 1965 estimated, [1226] 1966 estimated and then skipping to 1970, do those figures for the five years, three years are skipped, include any figures for color conversion?

A. Yes. I don't know exactly what years they would come in. We thought they would be spread over this five-year period.

Q. What figure did you expect would be spread over the five-year period?

A. We thought that color conversion would run about \$25 million.

Q. When you say we, did you discuss this with anybody in preparing this estimate?

A. Yes, with Mr. Gerard because in his report, he had pointed out that color conversion costs were—I don't know where it is but somewhere in his report, he talked about increased expenditures for color conversion.

Q. I direct your attention to Page 16 of the Roth, Gerard Report, the sentence starting at the very bottom of the page.

The sentence starting at the very bottom of the page and I want to read this sentence in the record because Mr. Kestenbaum quoted only a part of it yesterday.

"Moreover, once basic assets are required additional expenditures are minor although a significant investment in color facilities and equipment is now underway."

Do you see that sentence?

A. Yes.

[1227] Q. Is that what you had in mind when you answered my question a moment ago?

A. That is right because he says "Fixed investment required in the network business is relatively low as evidenced by his estimate that the total investment of the industry was \$120 million at the end of 1964."

Then he goes on to say that "Additional expenditures are minor although the significant investment in color facilities is now underway."

So I discussed with him what he meant by that or what kind of number he thought in ABC's case might be required. We in our discussion felt that this level of \$25 million spread over the five years would probably be the extent of that expenditure.

\* \* \* \* \*

[1263] TESTIMONY OF FRANCIS HART PERRY

Q. Directing your attention to the fourth benefit therein mentioned, to wit, providing a number of ancillary benefits in the marketing area. What were those benefits that you envisaged?

A. These were referred to as only general benefits at that time. It was our feeling that ITT was not widely known in the marketplace, that there was not much of a corporate identification with our product. That if we were [1264] to become identified over a period of time in the minds of the public with a name that was well-known as ABC, that this would brush off onto our products the beneficial results of this identification.

Q. How was that different from the second advantage which I quoted to you, to wit, improving the company's image?

A. That has to do with the stockmarket evaluation of the company that referred to the price/earnings multiple, not the advantage that would accrue in the marketing area.

Q. Was one of the possible advantages that ABC might be able to avail itself of the contacts that ITT had abroad with foreign governments and other entities in selling its programming and services?

A. I believe this referred to advantages to ITT, not ABC.

Q. Yes, but ABC would become a part of the ITT complex?

A. I think at that time what we had in mind is what I have described.

Q. Was there any notion that ITT might be able to market goods and services in the United States that perhaps it was furnishing abroad, and sell them in the United States under ABC's name or label?

A. No.

Q. Will you explain to me again what you did mean by [1265] the ancillary benefits in the marketing area?

Mr. WHIPPLE. I object. It has been explained already.

[1266] CHIEF HEARING EXAMINER. Overruled.

Let him answer again.

The WITNESS. We felt that there would be a general brush-off onto ITT products from the fact of our association with ABC, that many of our products of ITT were not well known in the marketplace and over a period of time as we became identified more in the public mind with a well known name such as ABC that there would be these ancillary benefits.

By Mr. GORDON:

Q. What products do you have reference to?

A. Such things as the Bell & Gossett pumps. We have a line of products marketed under the name of General Controls, a general line of products marketed under the name of Nesbitt.

Q. How do these industrial products benefit from association of ITT's name with ABC's name?

Weren't you really having in mind consumer products which are sold in quantities to the public?

Mr. WHIPPLE. I object to counsel asking two questions.

CHIEF HEARING EXAMINER. There are two questions there, Mr. Gordon. Will you break them down, please.

By Mr. GORDON:

Q. Take the first one first then.

A. I think this is a benefit in the industrial marketing area for a kind of identification of ITT and ABC in this kind of market area.

[1267] Q. You mean an industrial pump that you sell for construction——

A. These are not industrial pumps. They are pumps sold in the home market.

Q. They are sold to the home consumer?

A. That is correct.

Q. And what is Nesbitt's?

A. Nesbitt sells heating and ventilating equipment to the school market.

Q. What was the other company you mentioned?

A. General Controls.

Q. Whom do they sell to?

A. These are the consumer-type of controls as well as aircraft, industrial and commercial types of controls.

Q. Insofar as you were going to be selling to the industrial and commercial market there would not be much brushoff from the ABC name in that market would there?

A. I would disagree with you. You may be right but at least it was our feeling that there would be this kind of brushoff.

Q. Can you think of any consumer products that ITT was marketing or services that would have this beneficial cross effect that you mentioned?

A. Well, at that time and still at the present time we don't have much of a product range in the consumer area.

[1268] Q. You do make consumer products abroad, do you not?

A. Yes, sir.

Q. Including television and home appliances?

A. Television and radio and a limited amount of white goods.

Q. Was there any thought that you might be able to either sell in the United States from abroad or start up that type of production in the United States and benefit by the ABC name?

A. No, sir, there was not.



Q. Now you do have a company by the name of Avis, do you not, Avis Rent-A-Car?

A. That is correct.

Q. Avis Rent-A-Car might also have been benefited by the association of the ITT name with the ABC name?

A. That is correct, sir.

Q. So, you would not exclude Avis from one of the companies that would be availing itself of ancillary benefits in the marketing area which is in Item 4 of your letter?

A. That is correct.

[1303] By Mr. GORDON:

Q. Did ITT at any time make an effort with ABC to change the price agreed upon on December 7, 1965?

A. No, it did not.

[1322] TESTIMONY OF CHARLES CHARBONNIER

Q. What is your place of employment?

A. Metropolitan Life Insurance Company, 1 Madison Avenue, New York City.

Q. Your position?

A. My title is vice president—cash securities.

[1323] Q. Now, I want to inquire briefly, Mr. Charbonnier, into the circumstances of the additional loan represented by this agreement of March 25, 1965. Can you tell me first who approached [1324] whom with respect to this loan agreement?

A. We were approached by the company.

Q. What was the request of the company? The proposal of the company?

A. The proposal to the company was that we increase our loan up to \$70 million.

Q. That is what you did; is that correct?

A. That is what we did.

Q. Am I correct then that Metropolitan Life Insurance Company on this occasion granted the full amount of the additional loan requested by ABC?

A. That is right.

Q. Now, Mr. Charbonnier, what evaluation of ABC did you or persons under your direction make in order to determine that it was appropriate to grant the request of ABC?

A. By evaluation, I assume you mean, what study did we make?

Q. Yes.

A. We reviewed the company's balance sheet and we reviewed the company's earnings. We took such knowledge as was generally available to us and looked into the future and we felt that our \$70 million loan would be safe and determined to go ahead with it.

\* \* \* \* \*

[1326] Q. Did there come a time, Mr. Charbonnier, when American Broadcasting Company requested Metropolitan Life Insurance Company to waive restrictions upon further borrowing or to agree to permit ABC to make further borrowing?

A. Yes, they asked us to agree to permit them to make additional borrowings.

Q. Do you recall when the first such request was made?

A. I believe it was about the middle of August in 1966.

Q. Do you recall the circumstances of that request, what further borrowing ABC desired to engage in?

A. They asked if we would permit them, if we would consent to their entering into a loan agreement with banks to provide them with \$25 million which they would use in connection with their color broadcasting activities.

[1327] Q. Did Metropolitan Life Insurance Company grant the requested waiver?

A. We did give them a waiver permitting the bank loan.

Q. Can you explain briefly the reasons why your company was willing to waive the provision of the agreement?

A. ABC was in competition with CBS and NBC. Both NBC and CBS were providing color programs. ABC felt in order to maintain a profitable operation that it had to be competitive. We felt that even though more borrowing was involved that it was in our best interest to permit them to borrow this money so that they could compete more effectively in color broadcasting.

Q. Was it or was it not your understanding that money borrowed would be used to introduce productive assets into the company, into ABC?

A. It was my understanding that the \$25 million was to be used for color broadcasting, in connection with color broadcasting.

Q. Does your company have any general policy with respect to whether or not it will grant waivers to permit additional borrowing in circumstances of this sort?

A. We have a policy which can be generally stated quite simply. It is not a formal policy as such. It is to the effect that if it is good for the company it is good for us as a lender to the company. Of course, that has to [1328] be taken within proper bounds.

Q. I would like to go back for just a minute to the March 25 agreement, Mr. Charbonnier. Did you, at that time, have any occasion to determine what would be the maximum amount of money that Metropolitan Life Insurance Company would be prepared to lend ABC?

A. No, sir.

Q. Have there been any subsequent requests from ABC to borrow additional amounts from Metropolitan Life subsequent to March 25, 1965?

A. We have had no direct request as such. We have had a request to make a loan to a new subsidiary of ABC in connection with a Maren Theater operation.

Q. Is that called Marine World?

A. It is called Maren World out in San Francisco. We are working on that with them at the present time.

Q. Has Metropolitan Life Insurance Company at any time subsequent to March 25, 1965, had occasion to determine what would be the maximum amount that it is prepared to lend ABC upon request?

A. No, Mr. Grossman. It is not our practice to determine the maximum amount that we will lend to anybody.

Q. Now, getting back to the waivers, Mr. Charbonnier, were there requests for waivers of the borrowing restriction subsequent to the one that you told us about?

[1329] A. Yes, sir.

Q. Do you recall which was the next request for waiver?

A. We had two subsequent requests. One was to permit the bank loan to be increased from \$25 million to \$27.5 million, an increase of \$2½ million. We also were requested to permit ABC to borrow \$25 million from International Telephone and Telegraph Corporation—or is it now ITT corporation?

Q. And you granted both such requests?

A. We did.

Q. Would the company's reasons for granting both these requests be the same or different from the reasoning which you gave us earlier with respect to the \$25 million bank loan?

A. Different.

Q. What was the reasoning?

A. With the \$2½ million it really was a transfer of money. The \$2½ million equaled the amount that they would repay us on our loan during the year. So, really no increase in debt over the year was involved. It was a transfer between banks and Metropolitan Life. At the time we were tight for funds. Otherwise we might have been asked to waive. But as far as I know we were not asked to waive.

[1330] Q. Do you recall, Mr. Charbonnier, that I visited your office on March 28, 1967?

A. Yes, sir.

Q. And do you recall that in meetings with you at that time I inquired whether you or any other official of the Metropolitan Life Insurance Company had informed ABC that some existing or future borrowing from the bank would be subject to what was called a 50 percent limitation?

A. I believe you asked me, Mr. Grossman, what is the 50 percent limitation that Mr. Goldenson is talking about.

Q. Yes. What was your response to me at that time, if you recall?

A. At the time I was not aware that Mr. Goldenson had talked of 50 percent limitation. And I had my internal counsel present. Both of us looked at the legal documents that we had available and none of them indicated a 50 percent limitation and I wrote you a letter to that effect.

Q. Is this the letter to which you refer, Mr. [1331] Charbonnier, dated March 30, 1967?

A. Yes, sir.

Q. Which says, "Since our meeting with you on March 28, I have checked our files and talked with our people and can find no record of the matter of a 50 percent debt ratio being discussed in connection with our investment in American Broadcasting Companies, Inc."

A. That is right.

[1332] Q. May I assume, Mr. Charbonnier, that the letter of April 3, 1967, represented your best recollection at that time of what had transpired in your dealings with ABC?

A. If I am not mistaken, in my letter I say I do not recall the details of the conversation with Mr. Siegel.

Q. Yes.

A. However, it would have been perfectly reasonable for me to have said that we would not want to permit the company, we would not want to consent that the company create debt in excess of 50 percent because they were pushing 50 percent at the time.

Q. And you still have no independent recollection of that conversation other than—

A. No, I have no independent recollection of it.

Q. Mr. Charbonnier, if ABC were to request either a further loan from Metropolitan Life or a further waiver of the debt limitation, would Metropolitan Life be prepared to consider such a request?

A. We would always consider the request. Whether we would go along with it or not is something else.

[1359] TESTIMONY OF ERNEST J. KROPP

By Mr. GROSSMAN:

Q. What is your place of employment and position?

A. Vice President in charge of our branch at 30 Rockefeller Plaza.

Q. By our branch, you mean?

A. Manufacturers Hanover Trust Company.

Q. Did Manufacturers Hanover Trust Company have occasion on September 1, 1966, to enter into a loan agreement with American Broadcasting Company, Inc.?

A. As one of four banks, yes.

[1360] Q. And the three other banks were Bankers Trust Company, Chemical Bank, New York Trust Company, and the First National Bank of Chicago, is that correct?

A. That is right.

Q. How much money did Manufacturers Hanover lend ABC under the September 1, 1966, agreement?

A. \$25 million.

Q. Is that all four banks or Manufacturers?

A. That is a total of \$25 million for the four banks.

Q. So that Manufacturers Hanover lent \$6.25 million?

A. That is correct.

Q. Did American Broadcasting Company approach Manufacturers Hanover with a request for loan or did the bank seek out ABC?

A. American Broadcasting Company approached us.

Q. How much did they request for this loan?

A. \$6,250,000.

Q. So that the entire amount requested was granted?

A. Yes.

Q. Did ABC subsequently come to Manufacturers Hanover with a request for further loan?

A. Yes, sir.

Q. Approximately when was that?

A. Towards the end of 1966, the end of December.

Q. Did this result in a further loan to ABC?

A. Yes, sir.

[1361] Q. Would this have been a loan of January 3, 1967?

A. That is correct.

Q. How much did Manufacturers Hanover lend ABC in this loan?

A. On that, \$625,000.

Q. Was this again part of a four-bank loan by the same four banks?

A. That is correct.

Q. Each lending the same amount?

A. That is right.

Q. Was the additional \$625,000 which Manufacturers Hanover lent to ABC on that occasion the total amount sought by ABC in that request?

A. No. That was combined with a request for a short term line.

Q. What was the amount of the short term line?

A. Two and a half million dollars, current loan.

Q. For each bank, a four bank total of \$10 million?

A. That is right.

Q. Was that request for a short term line granted?

A. Yes.

Q. By all four banks?

A. Yes.

Q. Has ABC to date used any of the short term line from your bank?

[1362] A. No, sir.

[1365]

Q. Did you or to the best of your knowledge, did anyone else in the bank have occasion to determine around September 1966 the total amount which the bank would be prepared to lend ABC?

A. No, I don't think we normally make such a determination. We may wait for a request. Now, we previously had a \$10 million line to the company that we had set up, period. This doesn't mean that we make a determination that that would be the limit.

Q. Did you or to the best of your knowledge, did anyone else in the bank play any part in securing the necessary consent of Metropolitan Life Insurance Company to the loan by the four banks to ABC?

A. No, sir.

[1381] TESTIMONY OF FRANCIS HART PERRY (Recalled)

By Mr. FITZPATRICK:

Q. Still directing your attention to J-174, Mr. Perry, a memorandum from yourself to Mr. Geneen of October 13, 1964 relating to two potential—



A. What was that number?

Q. J-174. There was reference made there to two potential acquisition candidates, one of which was with ATE, Knoxville, Tennessee?

A. That is correct.

Q. To your knowledge, when was the decision first made that ITT would interest itself in a possible acquisition of television broadcast facilities?

A. To the best of my knowledge, we were interested in the early part of 1964, although I would not rule out the fact that we had an interest of some sort in 1963. I am unclear really as to when I first became aware of the interest in it.

Q. It was certainly by October 1964?

A. Yes, sir, that is right.

Q. Does it predate that by some period of time?

A. Yes.

Q. A period of six months at least?

A. I would say so.

Q. Mr. Perry, if I might direct your attention to J-176, a memorandum from Mr. Kenmore to yourself, dated October 5, 1964?

[1382] A. Yes.

Q. Now, there is a handwriting on that memorandum. Do you see that on the first page? Is that your handwriting?

A. No, sir.

Q. Do you know whose it is?

A. It is Mr. Kenmore's I believe.

Q. The decision was made at that time, was it—

A. The decision was made that if they had another offer which was attractive to them, we would not attempt in any way to interfere with the other purchaser.

Q. Now, sir, directing your attention to J-178, which was a handwritten note from Mr. Witting to yourself dated September 18, 1964, what did you understand him to mean when he said "We should build our own, perhaps, we should build our own".

Do you want to read it? It is very short.

A. The extract says, "Kenmore stalling them for a few days.

Since Whitney group looks dead, perhaps we should build our own if HSG wants to. (Gross, Hartford, Knoxville) et cetera."

I understood him to say that the price was too high for WATE, that the Whitney group does not look promising. So, therefore, Mr. Witting was suggesting the possibility that we might on our own buy a series of stations which would be put together in a group of stations.

Q. Was consideration given to buying individual stations and then becoming multiple owners in that process?

[1383] A. No serious consideration at that time, no.

Q. Was any consideration given at any time?

A. No.

\* \* \* \* \*

[1395]

Q. Would your function after the merger be generally to oversee the activities of ABC or the parent ITT?

A. Well, I will be a member of the board of directors as it is planned unless it is changed. I will be a member of the board of directors.

[1396] Q. Will you be on the executive committee, do you know?

A. I believe so.

Q. Do you have any idea presently as to what the activities of the ABC executive committee are?

A. Not in any great detail. In fact, I don't know.

Q. Have you read the various exhibits that were in attachments to the assignment application that detailed the various organizational charts and functions of ABC?

A. Yes, sir, I did.

Q. Did you attempt to familiarize yourself with those?

A. Yes, sir.

Q. As a member of the executive committee and of the board of ABC, what role will you play in making decisions with respect to the personnel of the organization?

A. It was some months ago when I read the document. If they deal with the role of the board vis-a-vis the personnel of the ABC, I don't recall.

Q. What would be your role as a member of the advisory committee with respect to decisions, if any, for expending funds on special events or documentary?

A. I would assume that the board would be consulted on such expenditures.

[1439]

Mr. Perry, you were questioned I think by both Government lawyers with respect to ITT's interest in the broadcasting industry. To your knowledge, has ITT given any consideration to entering networking on its own, that is by means other than acquiring an existing network?

A. No, sir.

[1458]

Q. Did you have anything to do with ITT's discussions with Travelers about a possible acquisition of NTIC in Hartford?

A. I was in only at the very tail-end of the discussions.

Q. And it was Mr. Geneen and Mr. Graham who handled that matter?

A. That is correct, yes.

Q. Did you have anything to do with Mr. Luke's discussions with Gross about the WJIM in Lansing?

A. No, I had nothing to do with that.

[1467]

#### TESTIMONY OF LEONARD H. GOLDENSON

By Mr. KESTENBAUM:

Q. Are you familiar with the Commission's opinion which was rendered in December 1966 in this matter?

A. I am.

Q. You are aware, sir, that the Commission's opinion stated in reliance upon your testimony that you have commitments which limited you to \$6 million further borrowing?

A. Absolutely.

Q. At what point, sir, did you become aware that you do not have a contractual commitment limiting you to \$6 million?

A. When I later discussed this with Mr. Siegel after the hearing he said that the 50 percent, he had been told that we were

getting up to our 50 percent. He said he doesn't think it was in the agreement although we did then check the agreement.

Q. When was that, sir?

A. I think after the hearing was over.

Q. Was Mr. Siegel present in the hearing room when you [1468] made that statement?

A. Yes, he was.

Q. When you discovered that the agreement did not have that provision in it did you call that to the Commission's attention?

A. I don't know whether the attorneys did but I don't think it was necessary because we were told by the Met that our limit was 50 percent, so the same thing was true whether it was in the agreement or was not.

That was the limit of our borrowing power.

Q. When you saw the Commission's decision which stated that you had a commitment limiting you to this further borrowing did you feel it was necessary to bring to the Commission's attention that you did not have a commitment to that effect?

A. I don't think so for the reasons I have already stated.

[1470] \* \* \* \*

Q. Mr. Jenkins is Chairman of the Finance Committee of Metropolitan Life?

A. Yes.

Q. And a member of your Board?

A. Yes.

Q. You never inquired of him what the maximum limitation is?

A. He never entered our Board until this loan was made. At no time has he entered into any discussions about this loan.

Q. You never inquired how much you would be able to borrow from the company?

A. I think it would be highly improper so I have never done so.

[1474] \* \* \* \*

Q. Since you don't know how the others allocate costs, it may be difficult to make a comparison of the performance of one company with another if you just take what they report as

network performance and distinguished from station performance.

A. Even if we almost reduce our overhead to nothing we [1475] would probably be close to a break-even so I think that answers itself.

Q. We have been talking about the fact that you have had a continuous increase in revenues over these years, including broadcast revenues, and some fluctuation in operating earnings.

Which do you think is more important as an index of ABC's growth during this period?

A. I would always think earnings as an indication because unfortunately we have to pay our bills with what we earn. We can't pay it on gross.

Q. Which do you think is the more important index of ABC's competitive position in the broadcasting industry?

A. Unfortunately because we have less affiliates, I think we have a 93.4 coverage——

Q. Could you answer my question.

A. I am trying to, if I may. I am trying to answer the question.

Q. It was not a complicated question?

A. Yes, it is in this sense.

CHIEF HEARING EXAMINER. I think the witness understands the question. He is making an honest effort to answer it.

Proceed.

The WITNESS. Earnings are important in this sense, Mr. Kestenbaum.

[1476] We have a 93.4 coverage. The other networks have approximately a 98 percent coverage or 99 percent coverage. That difference of five percent in coverage means in daytime and nighttime probably \$72 to \$73 million of revenue for the year '66 alone.

This is without news or any of the other things. In addition, because of our being forced to delay our broadcasts and can't go into these markets live, it costs us on our projection for this year with color prints approximately \$7 million which the other networks do not face.

So that actually when you say——

By Mr. KESTENBAUM:

Q. What costs \$7 million?

A. Your delayed prints. We have to get the prints in on a delayed basis and can't go over the cable. Therefore, it is imposed on us a high cost figure and a deficiency in affiliates that place us at a great disadvantage against NBC and CBS.

Therefore, earnings are highly important to our company, addressing myself to your question and, therefore, it is reflective of a very unfortunate situation where we are put at a very great disadvantage.

[1512]

Q. Will you tell me approximately how much of your present need is for feature film?

A. On the network, sir, or the stations?

Q. The network, sir.

A. We need approximately a three-year supply in advance for two nights of presentations to be competitive with NBC and CBS.

Q. When you say to be competitive, will you explain what you mean by that?

A. Yes.

Q. They are running two nights a week?

A. Yes.

Q. And you want to run two nights a week?

A. We are running two nights a week.

Q. Who began first to run two nights a week, sir?

[1513] A. NBC.

Q. How do you buy feature films, sir? What are the financial arrangements that are involved? How much do you pay down?

A. It varies by packages. I think last year at the end of the year, we had paid down \$35 million for feature film.

Q. Will you just answer?

A. I am trying to show you how the thing figures out. \$35 million we paid down in feature films in cash and we owed \$60 million. Roughly, that related itself that we had put up about a third down and the rest would be paid out over a period of time, now it varies.

Q. Let us take one transaction. Let us take a transaction you enter into now to buy films that you are going to show, let us say, two years from now.

A. So far this year, we have contracted for \$37 million of feature films and we have paid down approximately, we will pay down approximately this year \$9 million.

Q. What percentage?

A. Roughly \$9 million would be close to 30 percent, 25 to 30 percent.

Q. When do you pay the rest of the purchase price?

A. We start paying the rest quarterly.

Q. You start paying it when you show the films?

A. No. I think some of this will start to be paid [1514] quarterly, starting next year, some of it will be paid quarterly starting the middle of next year.

Q. Is film programing more or less expensive than other shows you put on the network?

A. It varies. When we buy Cleopatra, The Longest Day and it cost four to five million dollars, that is more expensive than anything we have on the network.

Q. When you pay more for a film, do you earn more from the film than you would from a comparable show, that is a variety or other show you put on during the same period?

A. No, this is done in the public interest, to give the public the best of anything that is available in the way of programming.

Q. Do you believe that buying feature films is one of the program innovations you described to the Commission?

A. In my judgment, we have to have a balanced form of program. We attempt to balance our programing by showing every type of programs available to the knowledge of our programing people to the public.

Q. In your letter of July 25, 1966, you stated that "the principal current criticism of television is sameness."

Do you still believe it is in the public interest for you to want to buy, for you to put on two films a week just because NBC is putting on two films a week?

A. Yes. Also, it is in the public interest for us to [1515] spend over nine and a half million dollars to \$10 mil-



lion on Stage '67, but it costs us, we lose four million dollars on it.

Q. You just told me a moment ago, sir, that the films do not earn as much money, do not earn enough money to make up the difference between the high-priced films and the comparable programming you put on during the same period.

A. I beg your pardon. You asked me do the films make any more money than your other programs.

Q. Than the programs you could have put on during the same period of time.

A. I said they do not earn more money.

\* \* \* \* \*

[1521] Q. How much of your programming is in color now, Mr. Goldenson?

A. All of our nighttime, from 7:30 to 11. All of our news is in color, that is the Peter Jennings News—you are talking about the Network?

Q. Yes.

A. Most of our sports, although Wide World of Sports on film crews around the world, we still don't have enough equipment to get all of that in color but some of those programs are in color.

Our American Sportsman is in color. Our NCAA football games are in color. I think basketball and Professional Bowlers Tour is in color. I think starting about now we have one or two daytime shows in color. When I say "daytime" I am talking about Monday through Friday, and we are hopeful that we can have enough studios colorized by the fall of this year to have all of our daytime in color. It may be that we won't have it ready until December, but we hope that we will [1522] have all of our daytime in color by the beginning of the fall season.

Joey Bishop, which will open next Monday night, which is late night, we have completed the colorization of that studio and that will be in color. I think that covers it.

Q. Once you have half or two-thirds or whatever the percentage is of your broadcast time in color, or as you have indicated nearly all of it, what else is required to put color on for the additional part?

A. There has been a great change taking place in the broadcasting business with feature films being on the air. It has been found that live variety shows against feature films do well. As an example, our Hollywood Palace and Lawrence Welk Show on Saturday night do extremely well against feature films, the last half of Welk and the whole of Hollywood Palace.

Dean Martin on NBC does extremely well against CBS's feature film.

Red Skelton does extremely well against feature films on Tuesday.

Now, in order to put on variety shows you need very large studios for the dance numbers, the production numbers, and this entails a very large expenditure in order to handle that.

CBS and NBC has these types of studios both on the East [1523] Coast and on the West Coast.

Unfortunately, we just do not have the facilities to compete with them in this respect. We feel that we must come forward with more live shows in order to meet this kind of competition and we just don't have the facilities.

Q. I am sorry, to clarify in my own mind, I take it by your response, I extract from your response the idea that the additional expense if you are transmitting or broadcasting one show in color and you want to broadcast another show in color is another studio if you need another studio for that show?

A. It depends on the type of show.

Q. There will be some shows you put on in the same studio?

A. Yes. May I also add just one other thing. Your big dramatic presentations we have found in Stage 67 if we want to do live shows we have had to go over to England to produce a number of these Stage 67 shows because we do not have the facilities to do them in the United States. We feel that it is imperative that we get large enough studios to handle these, what we call large dramatic presentations which we think also will do well against motion pictures on the nights that CBS and NBC have them.

[1531]     \*           \*           \*           \*           \*

Q. Sir, if you can recall, when you stated on July 25, 1966, that the \$90 million for the studio complexes part of a long-

range plan, if you can recall, can you tell me what you were thinking of when you said "long-range"?

A. Naturally were thinking within the terms of the five-year period, I mean construction in order to get ourselves in a position to become competitive, that we would do this over a five-year period.

Q. When was the report presented to you by the Austin Company, sir?

A. In July, 1966.

Q. This was a report concerning what?

A. This was a report concerning the New York and the Hollywood complexes.

Q. I take it that you recognize this document, sir; AR-39?

A. Yes.

Q. That is the Austin Company Report concerning the New York production facility which was presented to you in July, 1966?

A. That is right.

[1532] Q. Do you recall your reaction to the Austin Company report?

A. I certainly do.

Q. Could you describe it?

A. I told the Austin Company that they said this would take care of our needs until 1975 and we later got an estimate as to what the New York complex would cost of \$40 million and I took the position that we weren't going to invest \$40 million for a five-year or ten-year period.

If we were going forward we were going forward on a 25-year project, that we weren't going to invest our money foolishly.

Secondly, I felt they had not really thought the problem out. We had asked them for a long-range program to take care of our needs over a period of years. I just felt that they had not met the demands that we had asked.

Therefore, we severed our relationship with the Austin Company as a result of that and had another complete study undertaken in order to take care of our long-range needs.

Q. Therefore, in July 1966 what you had as far as New York was concerned was this study which was rejected by the ABC organization?

A. It was.

Mr. Siegel and I had a presentation by them and rejected it emphatically.

[1536]

Q. Can you tell us, sir, where you got the \$90 million number that you put in the July letter?

A. That, I believe, was prepared for Mr. Siegel by the engineering department if I recall.

Q. Do you have any idea whether you have any documents about that time which reflects that kind of number?

A. I relied entirely on Mr. Siegel in that connection.

[1584] By Mr. TIERNEY:

Q. I particularly refer to Page 567 of the transcript, beginning at Line 5.

Mr. GOLDENSON. If I may interrupt in order to try to clear this record, if I may, under our Metropolitan loan where we have borrowed \$70 million, it provides—and I am underscoring that—that we have a limitation of 50 percent of our assets as the outside limit of our borrowing, with the \$25 million we have just received for in borrowing from the bank, we are therefore presently at a four percent level. That gives us a latitude of three percent of \$200 million.

Do you remember this testimony?

A. I do, sir.

Q. Did I hear you correctly testify this morning that you had a conversation with Mr. Siegel after your testimony regarding this matter?

A. I simply said that my basis for that statement was conversations that I had with Mr. Siegel at the time we made the loan in August and that he had told me that the Met had warned us that we were getting close to the 50 percent and that we were up to about 47 percent.

So we had only three percent more leeway to go before the Met would probably stop lending us any more money. The three percent then on the \$200 million, I think I was wrong in my computation—our assets I think at that time were about 260

or so million dollars and you have to take off that the net [1585] quick liabilities and then take half of that.

I took the whole and applied the three percent to that. I should have applied three percent to half of it which would have come to three and a half million dollars instead of the six million dollar figure I gave at the time.

Since I was telling the Commission that we had more lending power than was necessary, I think our attorneys afterwards indicated to me that I didn't have to bother or it wasn't necessary to correct the record.

Q. What I am drawing your attention to, Mr. Goldenson—I appreciate that explanation—and you are a lawyer, are you not?

A. Yes, I am.

Q. You are trained in reading contracts and things that we lawyers are trained in at school, is that correct?

A. Yes, sir.

Q. You say that "It provides." I was thinking, are you now correcting this statement as being an incorrect statement made at that time before the Commission?

A. I am, sir.

Q. You are correcting that statement?

A. I am, sir.

Q. Let me ask you this: Did you or anybody on your behalf inform the Commission of your change or modification that you are now making?

[1586] A. If so, I am not aware of it.

Q. Do you conceive that you, acting as the principal officer of ABC, had a duty to so inform the Commission?

A. I don't think so because even though the 50 percent was not in writing, the fact that they were giving us a warning to that effect that we were getting up to the 50 percent and since they are the lender and that is the rule they intended to adhere to, we could not borrow any more than they had so specified.

Q. In any event, we do agree that that was an incorrect statement at that time?

A. That was incorrect.

Q. Another thing I think I am not particularly clear on or the record is the more precise date when the term merger was

first discussed between lawyers and ITT. I think you corrected your later this morning.

If I am putting words in your mouth and testifying for you, please correct me. I think you said it may have been sometime in January. Is this correct, referring to the time in your conversations with ITT, when the idea of merger first arose?

A. I said I first met Mr. Geneen—when I say first this is the first time I ever met him, on January 15, 1965.

Q. At that time, was there any discussion of merger?

A. I don't recall any discussion of merger that evening. He hinted at the fact that maybe there was a possibility of [1587] merging but as to getting into specifics or anything of that nature, it was purely a social evening.

Q. May I try to refresh your recollection in that regard, Mr. Goldenson?

A. Certainly.

Q. I am referring to J-5, a document in evidence in this record. It is the copy of the minutes of a special meeting of the board of directors of the American Broadcasting Company, Inc., which is your company, on Tuesday, December 7, 1965, at 4 p.m. E.S.T.

I presume that is Eastern Standard Time.

A. That is right.

Q. Do you have that document before you?

A. No, I don't.

Mr. J. McKenna. We will get it for him.

Mr. TIERNEY. Let the record show that Mr. McKenna is handing the witness J-5.

By Mr. TIERNEY:

Q. I am referring specifically to Page 2, Mr. Goldenson. The last paragraph on that page. Do you want me to read it or will you read it?

A. Why don't you, sir?

Q. Correct me if I am misreading.

Mr. Siegel further noted that Mr. Goldenson had reported to the board in January 1965 that he had been further approached [1588] by another emissary on behalf of ITT with respect to such a merger.

Is that correct?

A. That is correct.

Q. "That this emissary reported that Mr. Geneen had indicated a willingness to discuss an exchange of stock with an estimated value of \$70 to \$75 per share of ABC stock, et cetera."

Is that correct?

A. Yes, sir.

Q. Does this refresh your memory with regard to what might have been discussed by you in your social dinner, I believe you called it, with Mr. Geneen?

A. I don't think anything happened that evening. We met again on February 12 at 4:30.

Q. Excuse me. How can you talk in terms of February when the minutes refer to January? They reported that you had reported to the board in January 1965. Now, you are in February.

A. The reason for that is that I think after our January 15 meeting, a friend of mine in talking about the ITT thing, it says that he had reason to believe that ITT wanted to make an offer to us of this amount of money.

Q. May I interrupt, please? Was the word merger used at all or any word that would be synonymous with merger in your [1589] discussions with Mr. Geneen as early as January 1965?

A. January 15, 1965, you mean?

Q. You pick the date.

A. I don't think anything was mentioned with respect to merger that evening.

Q. Are you saying that the record of these minutes are incorrect.

A. No, I am not.

Mr. BERGSON. I don't have a copy of the minutes before me but he has read "An emissary of ITT".

By Mr. TIERNEY:

Q. Who is the emissary, Mr. Goldenson?

A. I think Larry Tish is a friend of mine whom I played tennis and who knew Mr. Geneen, he indicated to me that he had reason to believe that Mr. Geneen was prepared to make



us some kind of offer after our January 15 meeting, somewhere in this area.

Then Mr. Geneen called us for a meeting on February 12, 1965, but at that time, he only offered us \$65 a share.

Q. I am not asking you about the price of the share. I am talking in terms of the concept when the motivation for merger was discussed or negotiated or brought up for the first time.

A. I think on February 12.

Q. But not in January in any event?

A. Not in January.

[1590] Q. By the way, you mentioned the name of Larry Tish.

A. Tish.

Q. What is the man's full name and association?

A. Other than social?

Q. Apparently, he has some relationship with Mr. Geneen.

A. Only socially.

Q. Could you give, for the sake of the record, the name and address of Mr. Tish?

A. Well, I think it is the American Hotel in New York.

Q. Does he have a business?

A. Yes, he is president of Loews.

Q. Loews theaters, Inc.?

A. Yes.

Mr. KESTENBAUM. May I inquire for a moment? You referred to him as an emissary of ITT in response to my questions as Tsai.

The WITNESS. That was in December.

Mr. KESTENBAUM. This is in January. This is in January.

By Mr. TIERNEY:

Q. We are agreed at least the concept or the terms of possible merger were discussed as early as you now say as February 1965. Is that correct?

A. Yes.

Q. Does that change your testimony given this morning that indicated a later date?

A. Not a bit.

[1591] Q. You did not mention a later date?

A. No, I said February 12.

[1617] Q. Were these primary affiliates you have testified or I believe it is in the record, correct me if I am wrong, that you reach 93.x percent of U.S. television households in the U.S.?

A. I think it is 93.4 percent.

Q. Now this I had not heard up to this point. These you reach, and we are only talking about television now, aren't we?

A. Only television.

Q. You are in other businesses besides television and broadcasting?

A. Yes.

[1618] Q. How much would that percentage of 93.4 percent of all TV households in the United States increase if you took into account secondary affiliates?

A. I think our average is around 97.96½ to 97 percent. Somewhere in that range. But, Mr. Tierney, if I may, sir——

Q. I think you have answered the question.

Mr. J. McKenna. Mr. Tierney, you wanted the record complete.

Mr. TIERNEY. Yes, indeed and you are perfectly able to do that when I have finished.

CHIEF HEARING EXAMINER. Proceed.

The WITNESS. I just want the record to be correct. That is nighttime, prime time between 7:30 and 11:00, is 93.4. Other than prime time——

Mr. TIERNEY. I am not interested in that.

Your Honor, I ask that that be stricken because it goes far beyond that question.

CHIEF HEARING EXAMINER. I think it is necessary for clarification.

Mr. TIERNEY. That can be brought out by his own counsel. It is completely gratuitous.

CHIEF HEARING EXAMINER. It has to be done sometime. Let us get it done right now.

Mr. Goldenson, if you will give us the qualifications.

[1619] The WITNESS. The qualification is, sir, that we get into the 137 primary affiliates, 93.4. As to the secondary affiliates we may get in at 12 o'clock midnight or one o'clock in the morning or Sunday afternoon or Saturday afternoon when 15 or 20 percent of the sets are in use as compared with 65 and 70 percent sets in use between 7:30 and 11:00.

Therefore, the 96½ to 97 percent coverage does not mean that that is the number of homes being covered because you don't have the sets in use at the time between 7:30 and 11:00. That is why the question has got to be amplified.

[1641] The WITNESS. I have reviewed with Mr. Geneen and he in turn has advised me, his Board, that as to our regular operating budgets such as programming, I have advised him as to what we budget now for programming and at what rate it is increasing. I have advised him as to our news, that we have spent approximately \$25 million last year, 1966.

We will spend approximately \$30 million this year and we will spend approximately \$40 million next year because of the conventions.

I reported to him our budget on sports which was roughly \$20 million last year, \$25 million this year, it will be \$38 million in 1968 because of the Olympics, the Winter and Summer Olympics, which we have acquired.

In this area I feel that we will automatically be able and properly so to handle this on our own as a regular operating matter. If it comes to capital expenditures of an extraordinary nature that are unusual, I feel, if it is a large sum of money this will be brought to the attention of our own Board of Directors, the American Broadcasting Company and he and Mr. Perry will be on that Board and then if he feels it is necessary I think he then could very well bring it to the attention of his Board.

But I think in the confines of the budgets I have set out and advised him, I think that we can operate on our own as a regular operating matter and I would think that is the way a corporation should function.

[1652]

Q. With respect to news programs now, what is the policy of ABC as to the right to review or edit the news before it is broadcast?

A. The news of our company comes under the jurisdiction of Elmer Lower. He, in turn, has two men, Bill Sheehan, who is head of the TV news and Tom O'Brien who is head of radio news. They assign editors to the respective news, writers, the news that is going to be presented is written in the script form for the half-hour and is then edited before it goes on the air by the editor, in keeping with the policy that we have on file with the FCC and which NBC and CBS also have on file with the FCC, I think they all have the same policy.

Q. Do any sponsors have any rights to review or editorship?

A. None whatsoever. Absolutely none.

Q. Suppose—and I would imagine this would happen certainly, if not frequently, sometimes—suppose there is a dispute at Mr. Lower's level as to whether or not something should be broadcast, where do you go from there?

A. He is empowered to act. If there ever is any problem it is brought to the attention of Mr. Siegel. If there is any problem at that level it would be brought to me.

[1655]

Q. Since you have had a long experience, Mr. Goldenson, as a network principal official, what do we mean when we are talking in terms of public affairs programs, let us say, as distinct from news programs?

A. These are programs, informational programs in depth which will involve any public issue.

Q. Controversial subjects?

A. Controversial subject so long as they are treated objectively, that both sides are treated so that the public can make a determination as to all sides of the problem.

Q. If I may put the question to you with regard to your public affairs programs, the subject matter, content or the theme of any of your public affairs programs must not be cleared with, is this correct, with any member of the ITT?

A. Absolutely not.

[1656]

Q. Correct me if I am wrong. Is it a fact, Mr. Goldenson, that public affairs programs, and you have already indicated news, are red-ink items or are loss items in your broadcasting business?

A. Yes. In the year 1966, for your information, we lost approximately \$18 million in our news, that is news and public affairs.

Q. As far as you know, and you and I have been present at public proceedings where others have testified, and I believe you were present, as far as you know, your competition suffers the same type loss, is this correct?

[1657] A. They suffer losses, unfortunately, because of the lack of discrepancy in facilities. They can make much more money and offset the losses. Unfortunately, we can't.

So we do relatively more public servicewise than the other two networks for that reason. There again, I think it is an unfair standard.

Q. That may be very true. Within the context of their business, they have also suffered losses in public affairs?

A. That is correct.

[1659]

Q. Mr. Goldenson, just one more question and I won't keep you much longer. In an exhibit, it is attachment to your application, it is Attachment E, at pages 4 and 5, it relates to the responsibility for the selection of news and special events and public affairs.

If I may read, beginning at the bottom of Page 4. Let me read that, the last paragraph, "The responsibility for the [1660] selection of news, special events and public affairs programming is that of the president in charge of this department."

I presume that is Mr. Lower?

A. Mr. Lower.

Q. "Review and evaluation of programs, ideas, submissions are initially made by the producers in charge of special events and news and public affairs and documentaries respectively.

Program recommendations are then discussed at the news department staff meeting and are subject to the approval of the president of the division.

The scheduling of the approved programming then becomes the responsibility of the president of the television network in consultation"—that is Mr. Tom Moore.

A. Who also will be here.

Q. "In consultation with the president of ABC news"—Mr. Lower again, is that right?

A. That is right.

Q. "And is subject to the final", and I underscore this, "approval of the executive vice president of the company".

A. That is right.

Q. Do you want to change?

A. No.

Q. Is that Mr. Siegel?

A. Mr. Siegel.

Q. I thought a few months ago, you said it comes to you.

A. If there is any dispute of any nature, if Mr. Siegel [1661] should ever get in a fuss with any of the people involved, it would finally come to me. I have cloaked Mr. Siegel with the responsibility for making that determination. I hope no problem ever comes to me.

Q. Subject, of course, to your final veto or approval?

A. That is correct.

Q. To that extent, you have corrected this?

A. That is right.

[1662] By Mr. J. McKenna:

Q. Now, the record shows that in January and February of 1965, when you were approached by the ITT officials, there was no interest on your part in the merger at that time.

A. That is correct.

Q. Whereas, in November 1965, there was interest on your part?

A. That is correct.

Q. Will you state what brought about the change in attitude?

A. By the middle of 1965, Hollywood Palace was being colorized and we started to get word from our engineering people as to some of the costs of colorizing our studios and what they felt would eventually have to happen.

It became increasingly accented in my own mind, and I discussed this with Mr. Siegel, that we had two alternatives. Either to try to float a large loan to meet this problem or to consider a merger although we did not want to approach anybody on a merger.

We felt that as a company which was a one-purpose company, to float a loan would get us up into a figure where we could not turn, since we are a one-purpose company, it is somewhat speculative, you do run into recessions, you do run into rating problems, you do run into the question that the moment things [1963] turn bad, you have to cut back in your programming, you have to cut back in your news, you have to cut back in your public affairs, and I just felt that we should try to give thought to the possibility of a merger with a diversified company which had the resources and would be amenable to our progressive approach, as we have over the course of the last ten years, by underwriting what we considered was necessary to make us competitive."

We approached nobody. But in the summer of July, we were approached by the General Electric Company. We felt unless they could resolve any problem they might have with the Anti-trust Division, which they seem to have, we were not prepared to talk to them.

We were then approached, as I indicated before, in November by ITT and as the fall went along, CBS was already starting to announce going into full color at night and all of the problems that were attendant to our going fully into color, and at that time, we decided that if a satisfactory offer could be made under the conditions that we had specified, namely, we would have complete autonomy, a company that would support us in the forward progress of our news and public affairs and entertainment and sports and other areas, and give us the facility to become competitive and who actually in the case of ITT had the technology which we didn't have and



which CBS and NBC do have, we felt that we ought to give consideration to it.

[1664] Basically, that was the reason we proceeded seriously to consider their offer.

Q. Some question was also raised. Mr. Goldenson as to what would happen if this merger were not approved? In other words, what would your competitive position be in that event and what would you do about it?

A. If this merger was not approved, our analysis is that we would probably have to raise in total approximately \$185 million which includes the present loans outstanding.

We would have to pay ITT back \$25 million. We must pay the banks back within the next five years. So, over and above the \$120 million that we now owe, we would have to raise another \$65 million, making \$185 million all told.

This would, I think, based on every analysis we made, put us in a very precarious position and our board, I think, would have a very serious problem as to whether as a prudent board and a prudent company, we could afford to borrow that much money because since we are in a speculative industry and a one-purpose company, a recession could occur.

If a recession did occur, we would have problems, serious problems, and, therefore, in my judgment, we would have to consider the alternative of not borrowing that amount of money and I think we could raise the money, I have no quarrel with that.

It is just the conditions under which we would have to [1665] pay, and the restrictions that we would have upon us that would concern us rather than going forward with the raising of that amount of money, is to probably stop our forward progress of our East Coast and West Coast facilities.

I think we would have to address ourselves to losing areas such as the radio network which has been losing three and a half million dollars a year.

[1666] Mr. TIERNEY. May I respectfully object.

I think this is cumulative, repetitive. It has been going on. We concede this. I am afraid the questions induce long harangue and polemics and arguments.

Mr. J. McKenna. It is far from repetitive.

Mr. Tierney. I think your Honor permitted the witness to go through this. I even objected to it on occasion. I tried to stop him. You thought it was quite relevant, and he did it. He is doing it again.

CHIEF HEARING EXAMINER. I think this is too detailed, Mr. McKenna, as redirect examination.

Mr. J. McKenna. The question was partially redundant as Mr. Tierney said and he cut it off. I think it is important that this record be complete on this point. I think it is very important in reaching a public interest determination on this application, that the Commission have before it the consequences of failing to approve this merger.

CHIEF HEARING EXAMINER. Let the witness continue.

The Witness. In addition, as I have explained before, we lost approximately \$19 million last year in the news and with our budget going up I think we will lose more this year.

Mr. Tierney. We just have been through this.

I object to this matter. It is just repetitious and cumulative testimony that will extend the time of the proceedings. This is not expeditious. It is repetitive and I [1667] object to it.

CHIEF HEARING EXAMINER. Let the witness conclude.

Objection overruled.

The Witness. Therefore, I think we would have to give serious consideration to cutting back in our news, in our radio network, and any other loss areas, which I think is not in the public interest.

I think the public interest requires that there be three strong competitive networks.

CHIEF HEARING EXAMINER. Now I think this is going beyond, all of us agree with that.

Proceed.

By Mr. McKenna:

Q. Let me ask you some specific questions, Mr. Goldenson.

What would be your plans on cutting back, say, in operating expenses?

A. I think we would have to cut back in our personnel considerably.

Q. How about salaries?

A. We would have to cut salaries or eliminate personnel.

Q. What about the area of dividends?

A. That we might even have to give consideration to at an early stage.

Mr. TIERNEY. Your Honor, I object. This is so leading as to be too obvious to even object to, the matter of [1668] employment and salaries.

CHIEF HEARING EXAMINER. I think the subject matter is entirely appropriate. The questions are probably leading.

Mr. J. McKENNA. I will say, sir, that if Mr. Goldenson had been permitted to continue with what Mr. Tierney referred to as a harrangue or a word of that type——

Mr. TIERNEY. Polemic.

Mr. J. McKENNA. He would have covered the specific items that I am now bringing to his attention.

CHIEF HEARING EXAMINER. Very well, sir.

Mr. J. McKENNA. That is all I am doing.

By Mr. J. McKENNA:

Q. In your prior testimony, and I refer to your testimony in September, you indicated that approval of the merger would enable ABC to do more than it has been able to do thus far in the advancement of UHF.

In the event the merger were not approved would you be able to carry out those plans?

A. We would not, sir.

Q. What would you be forced to do?

A. We would attempt to get whatever hours we could get on the VHF basically in order to get as much circulation as we could rather than think in terms of long-range for the development of UHF.

\* \* \* \* \*

[1673]

Q. Mr. Goldenson, in the event you were to cut back as you said if the merger were not approved, what effect would that have on your ability to obtain clearances and affiliations in those markets where you didn't have them at the present time?

[1674] A. I think our affiliates would lose confidence in our company.

Q. You would have more difficulty obtaining clearances in those markets?

A. I feel so.

Q. In turn what effect would that have on the affiliates ability to compete?

A. I think it would make it more difficult for the affiliates to compete.

Q. Were the CBS and NBC competitors in the 137 markets?

A. Absolutely.

CHIEF HEARING EXAMINER. Do you have any factual basis for this or is this just a feeling that you have?

THE WITNESS. If you are not able to deliver a competitive service in those 137 markets, it is very difficult for a local station on its own to buy the kind of programming that a network can buy and service to individual stations over the country. I think this has been found in syndication type programs.

They just don't compete with network types of programs. I think that is self-evident.

[1675] \* \* \* \* \*

Q. You were examined this morning, Mr. Goldenson, about "ABC Past, Present and Future."

A. Yes, sir.

Q. An exhibit that was submitted in the application?

A. Yes.

Q. Mr. Kestenbaum was asking about whether your—

A. What page are you referring to?

Q. I am referring to pages 19 through 23—whether your major Studio East and Studio West projects were set forth in this exhibit.

A. Yes.

Q. He pointed out, and quite correctly so, that there were six specific items listed and that with the possible exception of inclusion under color conversion cost it was not mentioned.

I would like you to read from the record the introductory paragraph to the six itemizations.

[1676] A. "Among the major expenditures which ABC immediately faces if it is merely to retain the competitive position it has achieved, are the following" —

Q. I stress the word "immediately" for the record and I stress the words "if it is merely to retain the competitive position it has achieved."

I call attention, Mr. Goldenson, to the paragraph that follows, the inclusion of these six items; specific items, and ask that you read that also in the record. It appears at the bottom of page 22.

A. "The above six examples are only illustrative of the many greatly increased expenditures that are required merely to keep pace with television as it has developed to date. Enormous though they are they will seem small in comparison with what will be required in the years ahead to realize the benefits to mankind that will become possible of attainment in the rapidly approaching era of satellites and global television. See, for example, 'Projections for the Future' in an address by David Sarnoff before Screen Producers Guild, March 6, 1966, an address by Leonard H. Goldenson before the American Legion on February 28, 1966, a column by Jack Gould, New York Times, March 6, 1966. The escalating cost will reach figures that were thought unbelievable a few years ago. Resources much beyond those now available to a company of ABC's size and resources, which its competitors enjoy to [1677] much greater extent, will be required."

\* \* \* \* \*

[1678]

By Mr. J. McKenna:

Q. Again, coming back to some of the questions that have been raised as to why specific cost figures were not included in the March presentation, I refer you to your letter of July 25, 1966, to the Commission which was in response to the Commission's letter requesting more precise financial information as to needs.

I call your attention to page 2 and ask you to read the sentence which appears in the first full paragraph beginning "For competitive reasons."

A. "For competitive reasons the need for additional financial resources for specific amounts required and the use to be made of these funds were often phrased generally. We were also aware that the Commission has available to it in its confidential files detailed information on ABC's resources and earnings as well as similar information on the other two networks from which analyses could be made, comparisons drawn, and the need for additional resources evaluated."

Q. Now there has also been questioning, Mr. Goldenson, as to the possibility of ITT starting a network of its own. Did you ever consider ITT as a potential entrant in network business?

[1679] A. I did not.

Q. Are there companies that you would consider to be much more likely entrants, not that they are going to enter but they would be much more likely entrants if they were to be entrants?

A. Absolutely.

Q. Which companies?

A. Metro Media, RKO-General, Westinghouse, all of whom are producing programs at the present time that are carried on a syndicated basis.

Q. In the case of Metro Media where do they have their station, sir?

A. New York, Washington, Los Angeles, Kansas City, and they have a UHF in San Francisco. They sold their station in Sacramento. That is all I recall at the present moment.

Q. Is it correct, sir, that in New York, Los Angeles, Washington, D.C., and the San Francisco UHF permit which they have under option, they are not currently network affiliated?

A. Kansas City is.

Q. I omitted Kansas City.

A. All the others are not.

Q. Is that the reason for your believing they would be more likely to be an entrant?

[1680] CHIEF HEARING EXAMINER. I think you had better let him testify. Reframe the question if you will.

By Mr. J. McKenna:

Q. What significance would you attach to that?

A. The fact that they do not have a network affiliation in New York, Washington, Los Angeles and San Francisco, they are programming and syndicating a number of programs for these respective stations.

[1681] By Mr. McKENNA:

Q. In the case of RKO General, where are they stationed and are they network affiliated or not?

A. They are network affiliated in Boston and Memphis. They are not network affiliated in New York and Los Angeles.

Q. Do they have a station in the Detroit market, sir?

A. Not Detroit. It is Windsor, Canada. They cover Detroit but it is really Windsor, Canada.

Q. Is that network affiliated?

A. No, it is not network.

Q. Now, you mentioned in the case of Westinghouse, I believe, that they are already engaged in program production. To what extent?

A. Mike Douglass Program and the Merv Griffin Program which I think is probably, each of them is syndicated—in the case of Mike Douglass, I think it is over a hundred markets. In the case of Merv Griffin, I just don't know.

Mr. J. McKENNA. To avoid loading the record with material already in it, Mr. Examiner, but at the same time to call attention to it at this particular place in the record, I would like to point out that the Broadcast Bureau has requested that ABC provide an exhibit showing the breakdown of its revenues and expenses for the years 1963, 1964, 1965 and 1966 among news programs, public affairs programs, sports programs, and entertainment programs.

[1682] This material appears in AR-46 and I point out the significance of the increase in the budget for the news programs and the public affairs programs which began the same year that ABC began to go into a loss position.

CHIEF HEARING EXAMINER. Very well, sir.

By Mr. J. McKENNA:

Q. Mr. Goldenson, you testified as to the reasons for the merger, including your need for additional resources. Have



there been changes in the broadcasting industry, particularly the networking portions of it, since the merger agreement was reached on December 7, 1965, which has caused the position of your company, its need for its resources, to worsen or to get better?

A. To worsen.

Q. Will you explain what these changes have been?

A. Yes. As I explained today, if we are now to become competitive, we have to go into feature films. We have already committed in cash \$35 million up to the end of '66, since the first of the year, another nine million dollars.

In addition to that, we have \$88 million that we owe on films that will be released in the future. As a matter of fact, a company announced to all three networks yesterday that they will have a package of film coming on the market next Tuesday and have advised all three networks.

We do not know the exact price but we estimate it will be [1683] somewhere in the range of \$40 to \$50 million and they will require a large sum in cash.

If it is large, we will just not be in a position to compete with NBC and CBS, who do have large cash resources.

Q. In this connection, has there been any change in daytime programming by the networks during this period as a shift to color?

A. Definitely. Color costs have increased all of our costs immeasurably. As I said this morning, we are not able to charge any more than we are charging for black and white, yet we have the additional charges.

Q. Is it correct, sir, that in December 1965, the CBS daytime schedule was not in color?

A. That is true.

Q. What is the status of the CBS daytime schedule going into the fall of the season?

A. Of '67?

Q. No.

A. It is not completely in color yet. It will be completely in color by the fall of '67.

Q. Now, you mentioned among potential entrants, three, I will refer to them as broadcasting companies, Westinghouse,

RKO General and Metro Media. Are there any other companies such as motion picture production companies that might have reason to enter this field?

[1684] A. Since motion pictures are becoming a big factor and also since a lot of the motion picture companies produce a great number of your programs, I think they are potential entrants into broadcasting, network broadcasting.

[1691] \* \* \* \* \*

By MR. KESTENBAUM:

Q. You described just a moment ago Metromedia as a quite potential entrant into networking and you gave the reasons. If ITT were to acquire Metromedia would they be an even more likely potential entrant into networking?

A. My judgment is——

Q. Can you answer that?

A. The answer is no.

CHIEF HEARING EXAMINER. Proceed.

By MR. KESTENBAUM:

Q. You mean the additional resources available from the ITT organization would not make Metromedia a more potential entrant than they are now?

A. I don't think they have the qualifications from a programming standpoint.

Q. Metromedia has the qualifications from the programming, is that not right?

[1692] A. They have not yet been in the networking business as such. They syndicate several programs.

[1694] \* \* \* \* \*

Q. You described to us in response to your counsel's questioning the consequences that you state would follow if the merger were not approved.

Were you aware of these consequences in September of 1966 when you testified before the Commission?

A. I have been aware all along, if the merger didn't go through, that we would be facing——

Q. Why didn't you state them to the Commission in September of 1966?

A. I thought we did face it, that if it didn't occur he would have to cut back and I so stated.

Q. Well, did you then disagree with Mr. Geneen's statement that with ITT's resources, you could do this job in three years, three or four years, whereas without ITT's resources it might take you four or five years longer.

That is what he stated. Shortly thereafter, you stated that this merger was necessary to accelerate your firm's growth?

[1695] A. That is right.

Q. Now, did something occur between September of 1966 and today to lead you to the conclusion that it was not necessary to accelerate your growth, but to prevent other disaster?

A. It is absolutely necessary if we are going to become competitive to accelerate our growth.

Q. Would you like to explain to me why you didn't describe these consequences to the Commission in September?

A. I thought I had.

Mr. J. McKenna. Was he asked? I think that is pertinent. Was he asked?

CHIEF HEARING EXAMINER. I can't permit these interruptions, Mr. McKenna, we have to proceed by motion and objection.

Will you proceed?

By Mr. KESTENBAUM:

Q. Would you like to explain to me, sir, why you did not describe to the Commission these consequences in September of 1966?

A. I think the record will show that we would have to cut back, no more than that.

CHIEF HEARING EXAMINER. Let me interrupt, Mr. Kastenbaum.

Are you satisfied with the answer?

Mr. KASTENBAUM. What is that?

I am satisfied as it is the only answer we are going to [1696] get, sir.

CHIEF HEARING EXAMINER. I don't think so.

Why didn't you testify to these consequences counsel refers to back in September of 1966?

The WITNESS. I wasn't asked.

CHIEF HEARING EXAMINER. All right.

[1715]

\* \* \* \*

TESTIMONY OF ALBERT G. HILL

By Mr. FITZPATRICK:

Q. I am leaving that area, if I might, Mr. Examiner.

Directing your attention, Dr. Hill, to your article, "Technology and Television", and more specifically, if I might, to what is B-10, I believe it is Page 195, if my bifocals are operating properly, and more particularly to the paragraph on the righthand side—excuse me, the page 195, the first paragraph, beginning on that page, and I am quoting now, "Technically, it is possible to achieve direct broadcasting to the home or to schools from satellites in the next ten years."

May I ask you, what is the basis for that statement?

A. The basis for the statement is the knowledge of how big a payload we can put into a stationary orbit, and how much power we can put into that, and how large an antenna and a matter of pencil and paper computation of sending a signal up and back.

Q. Now, are you taking into consideration the present state of the art, when you gave a ten year period of time as an estimate?

A. Yes.

[1716] Q. This is based upon your experience in the field?

A. Yes.

Q. And the present state of the art?

A. That is right.

Q. Now, directing your attention, if I might, back to Page 194, and the second paragraph under the Subtitle "Satellites", and more particularly, the first sentence there, it says "With the present development under way by the National Aeronautics and Space Administration of large boosters for our National Space Program, the realization of a multi-channel system for television distribution is possible in the next five to seven years."

Now, sir, is that based upon the present state of the art?

A. Yes.

Q. And your knowledge in this specific field?

A. Yes.

Q. Is that correct?

A. Yes.

Q. May I ask you, are the other individuals who share your expectation in this area in agreement with the estimates of time that you have given in these two instances?

A. Yes. Some might put it shorter, and there is no question that you could do it faster, if you wanted to.

Q. Is that a question of how much money you spend?

A. Yes, entirely.

[1730]

By Mr. COHN:

Q. Doctor, I want to read you a statement and I want to ask you whether or not you would concur in the thought expressed in the statement.

The television industrial enterprise will continue to carry the major burden of research and development bearing upon the improvement of television and its efforts will continue to yield steady advances.

Would you agree with that?

A. I would like to see it.

Q. I can show it to you in my handwriting. Doctor, if that will be of any help to you. I will bring it over to you, [1731] just sit still, and I trust you will be able to read my handwriting.

(The document was handed to the witness.)

Mr. KESTENBAUM. The statement seems to me, Mr. Examiner, a little bit unclear, in terms of what benefits or what consequences are referred to.

The WITNESS. Well, I would put it this way: That this is really two statements, that the TV industrial enterprise will continue to carry the major burden of research bearing upon the improvement of television. That is statement number 1.

And, as a betting man, I would say that the chances are that that is correct.

The second statement, "And its efforts will continue to yield steady advances," I would say very small.

[1734] \* \* \* \* \*

Q. Doctor, would you please refer to your statement Mr. Kestenbaum has offered here for the record? Do you have it in front of you, sir?

A. Yes.

Q. In the first sentence, you referred to the fact that communication technology has been and continues to be in a highly dynamic state, and there are a number of potential technological innovations which would have an impact upon the television broadcasting industry. Will you please tell us what those potential technological innovations are?

Mr. KESTENBAUM. I believe they are stated in the next [1735] sentence. Is there any reason to go over it?

By Mr. COHN:

Q. Are they confined to that, Doctor?

A. The second says, including, among others, satellite applications, expansion of cable systems to the home, signal storage, and better picture designation, and better color.

Q. Which corporations or businesses and institutions, Doctor, are they that are working in these particular innovative enterprises?

Mr. GROSSMAN. Could I have the question read?

(The reporter read the pending question.)

The WITNESS. Well, it is a long, long list.

By Mr. COHN:

Q. Would it include Radio Corporation of America?

A. Yes.

Q. Would it include General Electric?

A. Yes.

Q. Would it include Westinghouse?

A. I presume so.

Q. Would it include General Tire?

A. Only in connection with satellite boosters and so on, that I know of.

Q. Are there any other corporations, Doctor, that you would include which are presently engaged in television broadcasting?

[1736] A. Any other corporations?

Q. Yes.

A. Well, there are several hundred, aren't there?

Q. This sentence of yours, namely those that are working in this particular field, would it include other corporations which are presently engaged in television broadcasting?

Mr. KESTENBAUM. As licensees?

Mr. COHN. Of the Federal Communications Commission.

Mr. KESTENBAUM. Doctor, if you know.

The WITNESS. I wouldn't doubt that all of those had broadcasting outlets.

[1751] \* \* \* \* \*

Q. Doctor, I want to come to the very last portion of your sentence, "And there is no", and I underscore "no", "evidence that the new organization would have incentives different from its competitors."

Now, are you familiar at all with any instances where IT&T has made advances, technological advances in areas where it already was operating, even though those advances made obsolete or outmoded the way they were then doing something.

CHIEF HEARING EXAMINER. Do you want the question read, Professor?

The WITNESS. Read the question, please.

(The pending question was read by the reporter.)

The WITNESS. I am sure that they have.

By Mr. COHN:

Q. Why do you say that?

A. I think any technology could, or any company based on technology, especially electronic technology, must compete and to survive, it must improve its product and its operations, and this sometimes makes them obsolete.

CHIEF HEARING EXAMINER. Do you have anything specific, I think counsel wants that.

Do you have something specific?

[1752] The WITNESS. Well, The French IT&T introduced microwave communications in 1939, I believe. This was the beginning and this is a specific example, and they are rather proud of it.



By Mr. COHN:

Q. Doctor, you do know, based upon your general familiarity with ITT, that it is one of the leading firms in communications technology, isn't that correct?

A. I think so.

Q. Based on your general familiarity with ITT, you would expect it, would you not, to make the kind of technological advances within its own organization, even though it might mean that another part of the organization was then manufacturing something or doing something which became obsolete?

A. Yes, sir.

Q. You said, "Yes, sir"?

A. Yes.

\* \* \* \* \*

# TESTIMONY OF HAROLD S. GENEEN

By Mr. GORDON:

[1781] Q. This was a meeting which threshed out various problems that you foresaw and others foresaw in the whole CATV area, is that correct?

A. It threshed out all the items that we had in that memo that you had there dated November 1st, that you showed me, the whole two page list of them.

Q. As a result of that meeting was FEC directed to cease absolutely any further activities in the CATV area?

A. As a result of that meeting—

Q. I am asking the question now.

Mr. WHIPPLE. I object to the form of the question, cease all activities.

Mr. GORDON. I object to Mr. Whipple's interruptions.

CHIEF HEARING EXAMINER. He is making objections here and there. I think he is entitled to, Mr. Gordon.

Mr. WHIPPLE. Sir, I am trying to keep my objections to a minimum. When the questions are objectionable I think I have a right to object to them.

CHIEF HEARING EXAMINER. At any time.

We must agree to that, Mr. Gordon. I will overrule the last objection that was made and counsel to proceed.

Mr. GORDON. Will you please read the question.

(The pending question was read by the reporter.)

CHIEF HEARING EXAMINER. What is the recollection of that, sir?

[1782] The WITNESS. The answer has to be no, the way the question is phrased because obviously they didn't stop everything and just leave it in mid-air.

By Mr. GORDON:

Q. The answer is no, is that correct?

CHIEF HEARING EXAMINER. I think the answer is complete and the record will speak for itself.

By Mr. GORDON:

Q. One of the problems you dealt with at the November 2 meeting concerned whether FEC could get exclusive franchises in the communities where it would be constructing CATV systems.

Isn't that correct?

A. I don't know. If I can read that list I can check it off. I believe that is one of the questions.

Q. Is your position this whole morning going to be that you can't answer a question unless you are shown a document, Mr. Geneen?

A. It helps me because there are so many documents and you are referring to parts of them all the time.

Let me say your questions apparently embrace more than what would seem to be on the surface.

Q. I think the questions are perfectly clear, Mr. Geneen.

CHIEF HEARING EXAMINER. Proceed with the examination.

Mr. GORDON. Would you read the last question and answer, please.

[1783] CHIEF HEARING EXAMINER. I do think this, Mr. Gordon.

You are going back quite a while. A number of things have been on this gentleman's mind in the past year or two. I think it is entirely appropriate when you ask a question that he ask you to refresh his recollection if you can, unless you are testing his memory.

Mr. GORDON. He stated that he just reviewed the documents in the past week, sir.

CHIEF HEARING EXAMINER. Excuse me, sir.

I will ask counsel if he won't proceed in that fashion. Whenever the witness desires to have his recollection refreshed, you

having established he has no independent one, he is entitled to a document if you have it.

If you don't tell us.

Proceed.

By Mr. GORDON:

Q. I believe the answer to my last question was that you—well, would you please read the last question and answer?

(The last question and answer were read by the Reporter.)

CHIEF HEARING EXAMINER. Let us proceed.

By Mr. GORDON:

Q. In fact, FEC did make inquiry about opportunities in areas where they could get exclusive franchises, did they not? And I show you J-123 which is from Mr. Guilfoyle to you, dated November 8, 1965.

[1784] A. That is correct.

Q. You felt this would enhance the security of your operations and the moneys you would be putting into CATV systems that you had exclusive franchises in the area concerned?

A. I didn't feel anything. We raised a number of questions in that meeting and reached a decision on those. This is only one of the questions.

Q. Wouldn't that aid—

A. Mr. Gordon, let me see if I can make this clear. You are making it sound like this was the sole reason. I am trying to point out that it is not.

Mr. WHIPPLE. May the witness be allowed to answer.

CHIEF HEARING EXAMINER. You may develop that later, Mr. Whipple.

By Mr. GORDON:

Q. Is my understanding correct that there were a number of problems in the CATV field?

A. That is right.

Q. One of them being the exclusivity of franchise?

A. Correct.

Q. To the extent you could solve the exclusivity problem, at least one problem would be removed?

A. Only one, that is correct.

Q. Then after this November 2 meeting and still in 1965, ITT-FEC still continued to look into new possible opportuni-

ties [1785] and to report those to ITT headquarters, did it not?

A. I am not sure what they looked into and reported after that because they were under a definite instruction to go no further in the way of commitments.

Q. I am not asking about commitments. I am asking just about looking into possible opportunities.

A. They were under the instructions that it was frozen unless they could justify anything further. Now to that extent they may have looked further.

CHIEF HEARING EXAMINER. But they were not precluded, of course, from investigating. I think counsel wished to know that.

The WITNESS. They were not precluded.

By Mr. GORDON:

Q. Now there came a time in 1965 when Mr. Vollbrecht was placed as your lieutenant to oversee the CATV operations, is that correct?

A. That is correct.

Q. And that took place in the latter part of October or early November 1965?

A. I can't place the date but it was prior to the November 2 meeting.

Q. Then in effect he was the boss of ITT-CATV effort, is that right?

A. Yes, he was.

[1786] Q. You instituted the procedure of having FEC supply weekly reports as to the status of the CATV operations, is that correct?

A. I don't know who instituted it.

Q. I believe it was you, Mr. Geneen.

A. I will be glad to acknowledge it if you can refresh my memory.

Q. Showing you J-134, which is your memo to Mr. Guilfoyle of October 27, 1965, it states in Item 21, "We need a weekly report on this whole subject and it should be issued each Friday".

Does that refresh your recollection?

A. That is right. That precedes the November date.

Q. But you do recall now that it was you who gave the instruction to have weekly CATV reports?

A. I indicated the need for it. I don't know who issued the instructions.

Q. Once you had indicated the need it became a mechanical process to issue the instructions did it not?

A. It may already have been issued. I may not have been receiving it.

Q. This would indicate that at least to your knowledge up to that time there had not been weekly reports?

A. That is correct.

Q. And you wanted weekly reports?

[1787] A. Yes, I was worried about them.

Q. You did get weekly reports after that?

A. I don't know what kind of reports I got now because you are going back a long way but I got enough reports prior to the November 2 meeting to take some action and then I got various reports after that.

[1801] \* \* \* \*

Q. Did you have any discussions in 1965 with anybody from ABC on ITT's expanding further into CATV activities?

A. No.

Q. Did you have any in 1966?

A. No.

Q. To your knowledge, did anyone else from ITT have such discussions?

A. No.

Q. They may have, but you don't know about them?

A. I don't know about them.

[1804] \* \* \* \*

Mr. GORDON. I have elicited from one of the other witnesses that Mr. Witting had been the president of Dumont and he had been with Westinghouse Broadcasting.

Mr. FITZPATRICK. That's definite. It was either through Mr. Chasen or —

Mr. GORDON. Am I to be harassed by Mr. Whipple's shortcomings and memory?

The WITNESS. Let me have the question again.

(The pending question was read by the reporter.)

CHIEF HEARING EXAMINER. If you know, sir.

The WITNESS. He was hired by us on the basis of his [1805] experience and work at Westinghouse in the consumer goods marketing and manufacturing. That is what we were interested in.

By Mr. GORDON:

Q. But he did interest himself in some phase of broadcasting while he was with ITT?

A. He attempted to interest us in them basically.

Q. In what fashion did he attempt to interest you, I mean ITT?

A. He had knowledge of the field and occasionally, he would bring people in and suggest we should look at some of these things that he had in mind.

Q. What people did he bring in?

A. I can recall he brought in Mr. Stark as a broker one time, asked me to meet him.

Q. Did you meet him?

A. Yes, I did meet him. I think that was the main one I recall. I can't recall—I know he had some conversations on a particular station but I don't recall that I ever met the principals.

And I know he had some interest in some principals in a group of stations but I don't recall whether I ever met them or not.

Q. He, meaning Mr. Witting?

A. Mr. Witting.

[1806] Q. From your meeting and discussion with Mr. Stark and Mr. Witting, am I correct in understanding that Mr. Witting took the initiative in asking Mr. Stark to come over?

A. He took the initiative. I recall one thing. He laid out as a requirement that we should buy television stations at eight times earnings which would have been very pleasant if one could do it. I think that was the instruction Mr. Stark had unless they were changed.

Q. Were you present when Mr. Witting gave Mr. Stark instructions?

A. No. I was present when he was discussing it with Mr. Stark. I don't think he had a formal assignment. It was exploratory.

Q. By "he", whom do you mean now? Mr. Witting had an exploratory assignment?

A. No. Let me say I don't know what Mr. Stark's reaction was but I can hardly assume that one could have bought them at eight times earnings.

Q. Mr. Witting, if he had the idea of buying them at eight times earnings, he apparently changed that impression, did he not?

A. I don't know.

He had a lot of ideas.

Q. Showing you J-178, which has—well, this is Mr. Witting's handwriting, is it not?

[1807] A. I don't know Mr. Witting's handwriting.

Q. Well, it has been stated by counsel for ITT that this is Mr. Witting who is the author of this document. This states, does it not, addressed to Hart, and I take it that means Hart Perry, and in the upper righthand corner, the name WATE is there and that is station WATE, I take it. "This looks good, I would say, at 15 times earnings. They are asking 17 and a half times."

So, apparently, Mr. Witting, if he had the notion of eight times earnings, changed that idea, did he not?

A. Well, I have never seen this document before it turned up in the exhibits but there is a document in the exhibits which is written with a copy to me in which he expresses the belief that ITT should never pay over ten times earnings.

Q. That was an earlier date, was it not?

A. About five months.

Q. It was an earlier document?

A. Yes. This would correspond to the time he saw Mr. Stark. I will be glad to refer to that document if you want it.

Q. I am surprised you seem to know the document very well.

CHIEF HEARING EXAMINER. No comment is necessary. Let us proceed with the examination.



[1808] By Mr. GORDON:

Q. This J-178 states, "Since the Whitney group looks dead, perhaps, we should build our own if HSG wants to (Gross, Hartford, Knoxville, et cetera.)"

"Will you show them this and advise Kenmore, please?"

Was this information called to your attention?

A. I don't recall it.

Q. You remember knowing about it?

A. No, I don't remember the document. I don't think I ever saw it.

Mr. WHIPPLE. Mr. Examiner, may the record show on the business of knowing this document that it was photographed and appeared at least in part in an article in Business Week, a nationally circulated magazine?

CHIEF HEARING EXAMINER. Very well, sir.

Mr. GORDON. May I inquire as to the relevance of that remark?

Mr. WHIPPLE. You have attempted to express surprise that Mr. Geneen knew this document.

Mr. GORDON. Let us clarify this. Mr. Geneen, as I understand it, stated he did not know J-178 but he was referring to some other document which has not even been inquired about.

Mr. WHIPPLE. I am sorry. I beg your pardon.

CHIEF HEARING EXAMINER. Proceed.

By Mr. GORDON:

[1809] Q. Did you discuss with anyone within ITT what effect the acquisition of ABC would have on ITT's expansion plans or not expansion plans in CATV?

A. I don't recall raising that question because we killed off CATV before we even——

Mr. GORDON. I move to strike everything after "I don't recall."

CHIEF HEARING EXAMINER. It will be stricken.

By Mr. GORDON:

Q. Is it your testimony that you killed off CATV expansion plans by ITT on November 2, 1965?

A. We put a complete freeze on it subject to their being able to demonstrate why we should go any further.

Q. Is this what you mean by killing it off?

A. Yes, because they have never demonstrated that we should go any further.

Q. Just answer me, is that what you mean by killing it off?

A. Yes.

Q. In November, you must have had some hopes and expectancies of being able to consummate a deal with ABC for merger.

Mr. WHIPPLE. May we fix the year?

By Mr. GORDON:

Q. November 1965.

[1810] A. You will have to fix the date because I had no expectancy of anything until at least November 23 when we first discussed it.

Q. Did somebody else on behalf of ITT negotiate with ABC during the month of November 1965?

A. No, sir, no one was empowered to negotiate for ITT.

Q. I am not asking whether they were empowered, sir. I am asking if they did negotiate.

A. They can't negotiate if they don't have power.

Q. Did they discuss?

A. I don't know. People discuss various things with me. They may have with others.

Q. Who gives them the power to negotiate?

A. I think it would have to be pretty formal.

Q. In what sense?

A. We don't give anybody authority to negotiate unless we have a formal understanding to do it.

Q. Are you talking about the negotiation after a preliminary contract is entered into?

A. I am talking about any negotiations.

Q. What do you mean there must be a formal authorization?

A. Let me put it this way. If we are going to have anybody negotiate for us, we have to have a formal understanding with them on the basis that we are going to negotiate and [1811] what we have in mind and we have to authorize them to represent us.

Q. By him, you mean somebody from the outside, a broker or somebody.

A. It could be a broker, a banker or it could be our own internal people. Basically, the Board has to finally approve and authorize.

Q. Mr. Goldenson states——

Mr. COHN. Which page for the record?

By Mr. GORDON:

Q. That he met with you on November 16, 1965 at the Waldorf Astoria. That is on Page 1487.

A. We had breakfast and we talked about nothing other than fixing a date to get together and see if we had some compatible answer.

Q. When Mr. Goldenson testified as to the November 16, 1965 meeting in answer to the question, "What took place at that meeting, sir". The answer was, "Mr. Geneen asked if I would be interested in resuming discussions on a merger. I said yes, provided that the price would be around a hundred dollars a share; I would be interested. He said he would like to think about it and could he get in touch with me about a further meeting."

So there was some discussion at the November 16 meeting about possible terms of the merger, was there not?

[1812] A. I would not consider that terms of the merger, a hundred dollars a share is pretty high.

Q. You are using the word discussion in the sense, when you have a discussion, if the terms are spoken about, seem to be unrealistic, you do not call it discussion of a possible merger?

A. Let me say it is not a serious discussion at that point. My impression was that it was an attempt to get together to talk about a possibility of a merger.

CHIEF HEARING EXAMINER. There was discussion of merger on the occasion. That is all counsel is asking, whether it was preliminary or important to your mind or unimportant.

The WITNESS. I would say it was an expression of interest in the merger. Discussion gets into a lot more than that.

CHIEF HEARING EXAMINER. Proceed.

By Mr. GORDON:

Q. Now, when Mr. Luke and Mr. Graham met with Harold Gross in New York to discuss a possible purchase of Gross Tele-

casting Company and when Mr. Luke journeyed out to Lansing to meet with Mr. Gross and showed him a tentative draft offer, I take it he was doing this with at least approval and knowledge and consent of the ITT officials and was authorized to so conduct himself?

Mr. WHIPPLE. I object to the form of the question. There is so much in it.

[1813] CHIEF HEARING EXAMINER. I think the witness understands. I will overrule the objection. If he does not, I am sure he will tell us.

The WITNESS. Let me say very simply that I was not aware of the transaction or proposed transaction.

By Mr. GORDON:

Q. Are you stating that Mr. Luke had exceeded the bounds of his authority and Mr. Graham had exceeded the bounds of his authority when they met and discussed the possible purchase of WJIM, or Gross Telecasting and the \$13 million price was mentioned in terms of ITT stock?

A. I was not aware of the transaction.

Q. You were not aware of the transaction at all?

A. No. I knew they had been talking with him and that is all I knew.

Q. Did you call them in and tell them stop talking to Mr. Gross?

A. No, I did not know that.

Q. You just told me you knew they are talking to him.

A. I said I did not call them in and tell them to stop. I presume if they had a transaction, they would have proposed it.

Mr. GORDON. I move that be stricken as not responsive to anything.

CHIEF HEARING EXAMINER. Strike it. It is not responsive.

[1814] Mr. FITZPATRICK. Would this be a good place for the morning break?

CHIEF HEARING EXAMINER. I thought we would run until 11 o'clock and then have a break for ten minutes and then run until 1, if it is agreeable.

By Mr. GORDON:

Q. Do you know that Kuhn, Loeb was asked to prepare an evaluation report on Gross Telecasting?

A. No, I don't.

Q. Do you know that a draft purchase order was prepared and shown to Mr. Gross in Lansing by Mr. Luke?

A. No, I don't know that.

Q. And that purchase offer mentioned a price of \$13 million in ITT stock?

A. I don't recall that.

Q. Did you receive a communication from Payne, Webber about Harold Gross in October 1963?

A. That turned up in the exhibits. Mr. Pratt wrote me and said he was a fine fellow and thought maybe we ought to be interested in it. I never met Mr. Gross.

Q. And your reply to Mr. Pratt was—well, let me show it to you. It is J-158, "Thank you for your letter of October 14. I have sent the enclosures over to Jack Graham in whose area this falls. I have not yet met Harold Gross mainly because I have been out of the country pretty steadily for the [1815] last several weeks. From all the reports I get he must be a very fine fellow, et cetera."

This was communicated to Mr. Pratt by Payne, Webber?

A. That is right. The usual polite reply.

Q. This is your reply to Mr. Pratt's letter to you?

A. That is my reply to Mr. Pratt, and the usual polite reply.

Q. Now, did there come a time in 1963, Mr. Geneen, when you conducted negotiations with Travelers Insurance Company about a possible purchase by ITT of WTIC in Hartford, Connecticut, and related radio properties?

A. We talked to Travelers Insurance. I don't recall the exact dates.

Q. By we, you mean yourself and Mr. Graham?

A. Mr. Graham had talked to them first. Then I talked to them at one point. Then I think Mr. Graham handled it from then on out.

Q. You met with Mr. Gladden Baker of Travelers in Hartford?

A. That is correct.

Q. Mr. Baker at that time was chairman of the finance committee of Travelers?

A. I don't recall his title. He was to retire.

Q. I understand at one point he had been an employee of ITT many years ago. Did you know that?

[1816] A. No, I didn't. That is very interesting.

Q. Did your discussions reach the point that you were actually discussing a possible price for the properties?

A. My memory is that they did.

Q. And the price was \$35 million in ITT stock, was it not?

A. No, it was \$35 million but I don't remember what Mr. Baker's proposals were, but they were different from that.

Q. From ITT's point of view, you were offering \$35 million in stock?

A. No, he was asking 35.

Q. What were you prepared to offer?

A. I don't think we ever got around to really come up with an offer that he would be satisfied with. That is my memory. \$35 million we thought was very high.

Q. You thought the price they were asking was too high?

A. Very high.

Q. If they had come down in price, he would have been prepared to buy it, is that correct?

A. I don't know.

Mr. WHIPPLE. I object to that.

The WITNESS. That is past history, now.

CHIEF HEARING EXAMINER. He has answered the question. He says he doesn't know.

[1817] By Mr. GORDON:

Q. Did you make any counteroffer to Mr. Baker?

A. I really don't recall because my memory if it is correct is that he was pretty steadfast in saying this is it or nothing.

Q. Showing you your cable to Mr. Graham, J-142, this is a copy of your cable, is it not? It is September 17, 1963?

A. Yes, that is my cable.

Q. Who is Alfred Mann, referred to?

A. That is our banker.

Q. With Kuhn, Loeb?

A. That is right.

Q. You were discussing a four percent as against a four and a half percent convertible security that might be paid to Travelers, is that correct?

A. We were discussing it. I am not sure they ever indicated any acceptance of it.

Q. When you stated to Mr. Graham and incidentally, who was Mr. Graham, at that time?

A. He was vice president in charge of our U.S. operations.

Q. Was he a director as well?

A. I believe he was. I am not sure the date of his being a director.

Q. When you stated "I would feel that we should press [1818] strongly for our own suggested answer plus Fred Mann's step formula on the conversion as the offer is indeed generous and perhaps, it is only at fault because it was not preceded by a period of haggling."

Will you tell us what offer you were there referring to?

A. I don't recall the details of that offer. As I said, we thought the 35 was high. As I said also, Mr. Baker as I recall was adamant about what he wanted.

Q. Are you talking about Mr. Baker's offer of \$35 million to sell as being generous?

A. No. I said I thought our offer was generous.

Q. I am asking what the offer was.

A. I don't recall.

Q. An offer was made according to this cable.

A. No. We were proposing an offer. He had made his terms very clear from the beginning as I recall. He made his position clear from the beginning that he would accept no other offer.

I think one of our problems was that we were trying to figure out an offer that we might get him to accept.

Q. You say the only trouble with the offer is that it was not preceded by a period of haggling between ITT and Travelers?

A. Well, it would be an observation.

Q. I mean it was haggling between the two parties?

[1819] A. That is right.

Q. Is it your testimony that there was no offer——



A. I don't recall that we made an offer. If we did, I am quite clear on one thing that no offer was ever accepted.

Q. By whom?

A. By Travelers.

Q. Was any proposal to buy Travelers put to the ITT board?

A. I don't recall. I think we may have discussed it because we had conversations as we went along. I don't recall we ever made a direct offer to Travelers to buy it.

Q. I am sorry. I am asking whether a proposal to buy Travelers was ever taken up at the board of ITT?

A. We may have discussed it there but I am sure we never approved any offer.

Q. We meaning the ITT board of directors?

A. That is correct.

Q. Where did the ITT board of directors meet in 1963 in October?

Mr. WHIPPLE. May I inquire as to its relevance, as to where they had a meeting some three and a half years ago?

CHIEF HEARING EXAMINER. I will let counsel proceed.

The WITNESS. I don't recall. We formally met in New York.

[1820] By Mr. GORDON:

Q. Does the board sometimes meet abroad?

A. Yes. When I say yes, on rare occasions we have met abroad three or four times.

Q. Do you recall a meeting abroad in 1963?

A. I know the meetings we have held abroad and where they were but I don't recall what the particular years were because this goes back four years.

Q. When they are held abroad, where are they held?

A. They vary. We have held them in Spain, we have held them in Italy. We have held them in Germany. Those are the three I can recall.

Q. When was the meeting in Germany held, what year?

A. That is what I said, I can't place the years which is which. It would be a fall meeting, that is true. September or October. They were all September or October meetings.

Q. Is it possible that the board did meet in Germany in September or October 1963?

A. Let me make it clear. We met in Germany, Berlin, as a matter of fact. We met in Spain and we have met in Naples. I am not sure which years were which. Naples was the first one, Germany was the second year and the third year was Spain.

Q. Do you still have occasion to meet abroad?

A. We have not done it for the last two years.

[1821] Q. When you did meet abroad, it was once a year, is that correct?

A. It was a rather unusual principal and we did it for about three years meeting in our major countries and then we stopped. Kind of a chore too.

Q. What was the purpose of meeting abroad. Was it for the convenience of some of the executives?

A. No, it was a matter of morale and so on with our groups over there. In other words, I think it is good for public relations and our relations with our own companies.

Mr. GORDON. I think, sir, it is just about time to break.

CHIEF HEARING EXAMINER. All right, sir. We will take a ten-minute break.

(A recess was taken from 11:00 a.m. to 11:10 a.m.)

CHIEF HEARING EXAMINER. On the record.

If you are ready, Mr. Gordon.

By Mr. GORDON:

Q. We were discussing ITT negotiations with Travelers respecting a possible purchase of WTIC in Hartford and related radio stations.

How many meetings did you personally have with Mr. Baker or any other official or representative of Travelers?

A. I remember one in Hartford. I think he came down to New York once. I don't have a clear recollection of that, but that is all I can think of.

[1822] Q. Did Mr. Graham accompany you on both those meetings?

A. He did on the Hartford one. As I say, I don't have a clear recollection of the second one. I had the impression he came down. I am not sure whether he came down before or after we terminated our negotiations with him.

Q. Did you leave it up to Mr. Graham to carry on any further discussions or negotiations with Mr. Baker?

A. I did up to a point and then at a point, I killed the project.

Q. You killed the project, yourself?

A. That is right.

Q. I thought you stated earlier that this had been, you thought it may have been submitted to the ITT board?

A. Well, I am saying that I killed the project at the point Graham was still continuing with it. I said we discussed it at the ITT board.

Q. There was a vote taken at the ITT board meeting?

A. I don't recall.

Mr. GORDON. Mr. Examiner, I think this may be rather important. I should like to request the witness to produce for us the original minute books of ITT showing the meetings from September through December of 1963.

CHIEF HEARING EXAMINER. Very well, sir.

Mr. WHIPPLE. Mr. Examiner, this comes rather late. We will certainly do it. But why should we produce the minute [1823] books. They are in New York. Why can't we make photocopies? From what date, Mr. Gordon?

Mr. GORDON. Let us take it from September 1, through December 31, 1963.

CHIEF HEARING EXAMINER. Very well.

Mr. WHIPPLE. Insofar as they refer to the Travelers matter?

Mr. GORDON. I am afraid we will have to look at them.

CHIEF HEARING EXAMINER. Very well, sir. All minutes. The originals. Proceed.

Mr. WHIPPLE. You don't mean the originals, Mr. Examiner.

CHIEF HEARING EXAMINER. That is what counsel has asked for.

Mr. WHIPPLE. May it be understood that we make photocopies with the right of Department of Justice to look at the originals. It is the usual way we work with the Antitrust Division.

Mr. GORDON. If we may reserve that right.

Mr. WHIPPLE. Of course.

CHIEF HEARING EXAMINER. All right. There will be no difficulty, I am sure.

Proceed.

By Mr. GORDON:

Q. Let me make an inquiry off the record.

CHIEF HEARING EXAMINER. Off the record.

[1824] (Discussion off the record.)

CHIEF HEARING EXAMINER. On the record.

By Mr. GORDON:

Q. Did ITT hold any meetings with Corinthian representatives respecting a possible purchase of that broadcasting group?

A. I don't recall. This is the group I was speaking of, Mr. Witting was speaking of.

I am sure of one thing, it died very quickly.

Q. I believe Mr. Kenmore testified that he did meet with the Corinthian representatives. Would that refresh your recollection?

A. He may have, but I don't recall it.

Q. You have no recollection whatsoever? I believe you testified that you met with Mr. Stark. Do you recall about what time that was?

A. No.

Q. What year?

A. It would be very difficult for me to place all this, Mr. Gordon, but I would guess it was in 1964.

Q. Did you discuss that Mr. Stark might go out and try to find you some broadcasting properties that might be available, group stations?

A. I don't know how you would discuss it. He was presented by Mr. Witting as being the outstanding man in his [1825] field. As I said before, my recollection was that he was given an assignment of eight times earnings. I don't know what came out of it.

The only thing I recall came out of it was the Corinthian discussion and that died. I don't know of anything else that came out of it. Let me say I don't recall having spoken to Mr. Stark after that one meeting.

Q. Who brought it to your attention that Corinthian, that there would be no deal with Corinthian?

A. I believe Mr. Witting told me. I don't recall it that clearly.

Q. Do you have any knowledge about any discussions with Storer about a possible acquisition of Storer by ITT?

A. No.

Q. How about Capitol Cities?

A. No.

Q. As I understand it, Mr. Stark was given rather general instructions to try to find some group station owner who was—it was not limited to Corinthian, was it?

A. Mr. Witting had the feeling that Mr. Stark could find some broadcasting stations in the area of what he was talking about at that time. How far they explored it or what they did, I have no knowledge. I only saw him once. As I say, in my mind, I thought the multiple that was suggested was very low and it got nowhere.

Q. How do you know that was the multiple that determines [1826] Mr. Stark's mission?

A. I don't. He is a broker. I don't know what he intended to do. All I say is that I saw him once and that is all I saw him.

Q. Do I understand correctly that at some early time in 1964, Mr. Witting had suggested the possibility of buying stations at, you say eight times earnings—

A. That is my memory.

Q. And then I showed you a document which indicated that later in 1964, Mr. Witting was talking about buying stations at 15 times earnings. Are you assuming that broker Stark was instructed by Mr. Witting to find stations at eight times earnings?

A. My memory was he was at the time I talked with him. What happened after that I don't know.

Q. What was the discussion with Mr. Stark?

A. Mr. Witting brought him in and asked me to meet him. We sat there. He said, "He is a very capable broker in the field. He will try to look around and try to find us some stations and I told him eight times earnings."

Q. It was that conversation that Mr. Witting mentioned eight times earnings?

A. That is correct. That is my memory.

Q. You state this conversation took place when in 1964?

[1827] A. I said I couldn't recall it exactly.

It would be about the time we were talking over the Corinthian question.

Q. It was probably after May 6, 1964. I show you a document from Mr. Witting to Mr. Perry, a copy addressed to you, dated May 6, 1964, J-208. Mr. Witting there refers to the fact that he is going to meet with Mr. Stark and he invites Mr. Perry and Mr. Kenmore to attend the meeting.

So it would be correct to say that your meeting with Mr. Stark probably took place after May 6, 1964?

A. Yes. It says right in here, eight to ten or twelve times earnings. So he has three sets of figures there.

Q. At this time, he is talking about——

A. Eight to ten to twelve times earnings.

Q. Apparently Mr. Witting had gone off from his earlier estimate of eight times earnings.

A. I don't know what he was doing.

Q. What was your reaction in your meeting with Mr. Stark? Did you tell him, "No, Mr. Stark, do not go look for stations for us"?

A. No, we were interested. If he could produce stations at eight times earnings, I think anyone would be interested.

Q. Now, we see here is a range of eight to ten to twelve times earnings.

[1828] A. It didn't register on me as to anything that I had to do about it.

Q. Was your meeting with Mr. Stark prior to the May 6, 1964 memorandum?

A. I don't recall. This is about a 15 or 20 minute meeting.

Q. Actually, the paper you have been referring to as the eight times earnings paper is this document 207 and this expresses a range of eight to ten times earnings, does it not?

A. I referred to his conversation with Mr. Stark as telling me that he had given a figure of eight times earnings. When I referred to this document, it said ten times.

Q. This document is J-207?

A. That is right.

Q. And J-207 also states, does it not, "Kaiser are pursuing a sound but not too dramatic policy. They have applied for UHF channels in the top seven markets in U.S.A. and in seven or eight years will have investment worth many dollars. This approach might be worth considering by ITT."

Is that so stated?

A. Yes, it does.

Q. Were any studies made by ITT as to the possible availability of UHF stations or the UHF opportunities in the United States?

[1829] A. I don't recall.

Q. There may have been but you do not know?

A. That's correct.

Q. Are you familiar with this memorandum from Mr. Kenmore to Perry of August 18, 1964, J-211?

A. No, I don't recall it. I was just reading it to get its content.

Q. The last paragraph indicates, it states "That the Corinthian figure is something of an estimate. We didn't have a published balance sheet but in the case of Storer and Capitol Cities, which would be the most likely companies we might look at beyond Corinthian, but 50 percent of its company's assets are represented by intangibles."

Were there any discussions within ITT about the desirability of acquiring Storer and Capitol Cities?

A. Internally, you do a lot of studies, Mr. Gordon.

Obviously, the broadcast industry is not so large that you would not pick up all these groups to look at. I don't think this in any way implies that the companies are available or that we even talked to them.

Q. I am afraid you did not hear my question. I asked if there were any discussions in ITT.



A. We have thousands of discussions, Mr. Gordon. We may well have discussed those companies. I don't specifically recall such discussions.

[1830] Q. Now, did you have any discussions with your bankers or Kuhn, Loeb, about what would be an attractive proposition to purchase Corinthian?

A. I think at one point we were speculating how we could buy it. We were attempting to set up a holding company approach. I think I should add to that that we never made an offer to Corinthian.

And I am not sure they were ever for sale. This is the type of internal thing I am speaking of where we study.

Q. J-210 was not an unsolicited plan adduced by Kuhn, Loeb to you. You must have had previous discussions with Kuhn, Loeb which led to J-210.

A. Well, discussions may have only been on the——

CHIEF HEARING EXAMINER. Sir, did you have discussions, yes or no, and then we may move on.

The WITNESS. Mr. Examiner, this is an implication we had discussions about the company. I think the discussions we would have with Kuhn, Loeb on a subject like this would be purely in the framework of how to finance something.

CHIEF HEARING EXAMINER. That is the question.

[1831] By Mr. GORDON:

Q. This letter does refer to Corinthian, does it not, the important television broadcasting enterprise?

A. It doesn't refer to them, but I think I recognize the figures about those which would have been Corinthian.

Q. Well, your counsel has so told us.

Now, you also have some consideration to the possibility of acquiring WATE in Knoxville, did you not?

A. Somebody gave consideration to it. I was unaware of that when completed.

Q. I am afraid your recollection is a little bit at fault here, sir.

A. All right. May I see the document?

Q. Here is a memo from Hart Perry to you dated October 13, 1964, referring to WATE. This is J-174.

A. He says it is unattractive. I guess that is why I don't remember it. He says he is turning them down.

Q. The last paragraph states that, "Attached is some material on WATE with notes from Chris Whitting. Bob and I," referring to Kenmore, "believe we should continue to look at multi-station possibility before going the route of individual acquisitions."

A. I don't recall.

Q. Then it was apparently unattractive in the context that perhaps it would be better to acquire a group station owner? [1832] A. I didn't write it. As I say, I was unfamiliar with the whole situation.

Q. But you did make a reply to Mr. Perry, did you not?

A. I probably said I agree, whatever it was.

Q. You did?

A. That is what I normally do.

Q. Now, I refer to J-175. By this time Mr. Whitting was stating that WATE looked good at 15 times earnings. That is the document I was showing you before, J-178.

A. That was not sent to me—

CHIEF HEARING EXAMINER. Now, the question is what, Mr. Gordon.

By Mr. GORDON:

Q. Is my understanding correct that on or around this time in 1964, being September and October of 1964, ITT became more interested in the possibility of acquiring a group of stations rather than individual stations; is that correct?

A. I would think that probably part of our thinking all through that period was the fact that any individual station did not really represent—this is my thinking, let me put it that way—represent a worthwhile entry into the field. This is what seems to come through all this, because we never did acquire any of these stations you are talking about. You are asking a philosophical question and I am trying to give [1833] you an answer.

Q. I am asking about this period, at least in September 1964. Can't you answer me directly—

CHIEF HEARING EXAMINER. Did you become more interested?

The WITNESS. I can't answer that kind of question. I am giving my general reaction all through this period. You remember I said I killed the Traveler station. The basic reason in my mind at that time was, what are we doing with one station.

By Mr. GORDON:

Q. You were interested in getting into broadcasting?

A. That is correct. We made no secret of that. These are stations we are talking about now.

Q. Why were you so intensely getting into broadcasting?

A. We were not interested in broadcasting to the exception of everything else. While all this is going on we are moving in a great many other fields besides running our business. You are giving an impression on intentness on this as if it were an overwhelming preoccupation of management at this point. I would like to make the point this was only one in many alternative areas we were moving.

I think it is significant we moved in the financial services field, we moved into Avis, which is a service field. We moved into many areas during this same period and we were considering documents on all these other things in the same [1834] manner, but we did not move on any broadcasting stations. I think that is quite significant.

Q. I assume you are familiar with this document J-238?

A. Yes, I am familiar with that document.

Q. When it states in the first sentence, "As you know for about two years we have been intensely researching the broadcasting industry and closely following all developments that might lead to possible acquisitions because of our belief that this industry represented one of the most attractive fields for potential ITT entry," so when I was using the word intense interest I was not too far away from the language of J-238?

A. I accept that. I was trying to draw out the fact that it was not disproportionate from many other things we were doing.

Q. I still ask, what are the reasons for your serious and intensive interests in getting into broadcasting?

A. We felt it was one of many alternative fields that would be attractive to the company. As I said, we moved into a num-

ber of them. This was one we had not found a way that it was satisfactory to move into. So on this basis we have been going along—a lot of the these activities you are describing took place at secretary levels. WATE, I never even heard about, except Hart sent me a note and I turned it down. From the standpoint of significant entry in my opinion [1835] it had to be significant.

This, I think, underlies our concern about the Hartford station. Basically, this is why I killed it off. This was my decision.

Q. You still have not answered my question why TV broadcasting industry was attractive to you? What elements?

A. It has a high growth rate. It has a very high record in the past of growth. We think it is a superior advertising medium. We think it is an underpriced advertising medium. We think it has a great future. This is our reasoning.

Q. There is some indication as one of the service type industries it is less prone to cyclical change than, say, manufacturing?

A. That is correct. As a matter of fact, in the same J-238 I went through because I was interested, since this has all risen, I have found 40 specific things said in there which are pluses for the broadcast field, almost 40.

[1837] \* \* \* \* \*

We speak here of the difficulties of ABC in the past and the fact that it should grow faster as the economy reaches from 2½ network toward a three.

Q. What is meant by that, sir, "2½"?

A. Well, this is a phrase that is used. What is really said is that ABC is in a third position and basically gets what is left over in the degree. As the demand grows, obviously their position will improve more rapidly relatively to the other two which are mature and filled up. I think that is a perfectly conceivable concept.

Q. You mean there is not enough advertising to support three networks?

A. What it says is that the advertising will tend to [1838] go to the two older networks with their larger affiliate lineups and that ABC has been coming up as a third. We think that as the growth of advertising moves that this will benefit

ABC more rapidly than it will the mature networks. This is to be proven.

I think we took the position in here that the network, based on our own computations, was, while it was losing money, it was priced at a very low figure. This represents an opportunity for the future which with good work we think we can materially improve toward the levels of the other two networks, although I think we were very careful in our proxy statement and other places to point out that we may not move them out of the number 3 position for quite some time.

\* \* \* \* \*

[1844] Q. You must have known before July that there were going to be heavy expenses incurred for colorization and new studios?

A. We knew they would be heavy. We did not have a figure.

Q. As I understand from Mr. Luke's and Mr. Perry's testimony, after the planned agreement of merger was signed on February 14, you had a 60-day period in which you could walk away from the contract as it were. It was a sort of option.

[1845] A. I think it was a period when we had a chance to exchange for the first time formally information about the companies.

Q. I think your December letter of intent provided for the exchange of information.

A. I know that we had some earnings tests and some net asset tests and our usual tests that were in the agreement—this is the February 14th agreement—which had to be met or in theory either side had the right to walk away. I don't think it was just an option that you could walk away for any reason.

Q. Whatever the reason you could walk away for even though you knew there would be heavy costs incurred you did not choose to walk away from it?

A. That is correct.

Q. What efforts did ITT make to ascertain what its costs would be so that it could decide whether to walk away from the contract?

A. I think we were aware of the fact they were trying to develop their own figures. Rightly or wrongly we assumed they

would not be so far beyond the requirement of the industry or of the competitive industry of their type that it would be of concern to us. I think subsequent facts have proven that to be so.

Mr. GORDON. Will you please read the answer back?

(The reporter read the record.)

By Mr. GORDON:

Q. You mean a spread of the \$25 million that you had estimated back in J-238 as compared to \$124 million, did not indicate to ITT any cause of undue alarm?

A. I think that is fairly put, not undue alarm. Incidentally that is over five years. You see, we invest about \$200 million, a little short of \$200 million a year right now. So, the idea of having to put in an approximate \$20 million a year over and above our forecast for a company doing almost a half billion dollars is not out of line with what it might well take to be competitive. Beyond that I think all the money that is being spent here is very well invested.

Q. Did you inform your stockholders that there was going to be anything like this kind of spread at the annual meeting in April?

A. We didn't have the amount of the spread. We informed our stockholders that there would be expenditures for color. We informed them of the fact that we felt that the fields that ABC were in represented fields of substantial growth as we saw them and that we felt that with our resources and technical capabilities that we could materially expand it and we felt basically it was a worthwhile move.

Q. ITT did not attempt to renegotiate the \$100 million.  
[1847] A. No, the earnings have not changed. You do not want to mix up the difference between investment which will be returned and loss of earnings. If we had real concern about earnings this would be another problem, I think.

Q. I understand their earnings have increased over the years rather steadily and are higher in 1966 than at any point in ABC's history; is that correct?

A. Their last statement shows they were up about 14 or 15 percent.

Q. You were projecting in J-238 about a 16 percent increase?

A. That is correct.

Q. You were pretty close?

A. Well, I will have to say we were lucky.

Q. Was it not part of ITT's established procedure to get capital projected on companies to be acquired from the company to be acquired?

A. I would think normally we would look into this. In the case of ABC I think our problem, as I said, was largely of having figures available, that they felt were hard enough to give us.

Q. This was probably one of the biggest mergers you have engaged in if not the biggest. You still felt justified in going ahead with the contract and not trying to renegotiate [1848] it even though you had to wait until July to get your hard figures?

A. To use your own words, I think it is also one of our big opportunities.

Q. I am afraid I am still a little confused, Mr. Geneen. Perhaps you can help me out. When was the first time you had a conversation with ABC representatives in which they indicated that there was going to be substantial requirements, capital requirements, for colorization, say for colorization?

A. Well, if you are talking about hard figures, this is one thing.

Q. No. I am not talking about hard figures.

A. From the very concept of having to go into a competitive network it would be my assumption, without any other words, and we all agree in a sense that this would require investment.

Q. I am afraid you are not answering the question. When did you first have a conversation and learn from ABC that ABC anticipated having large capital expenditures for color conversion?

A. I don't recall the specific conversation. My memory would be that when we talked about making a competitive network at the very beginning we all understood.

[1849] Q. I am not asking for your assumptions on your concepts, I am asking when ABC directed your attention to their asserted need for capital improvements for color.

A. In our negotiations they made it clear that they had to convert to color.



CHIEF HEARING EXAMINER. Approximately when would that be?

The WITNESS. November 23. I am wrong in that other date, too.

By Mr. GORDON:

Q. When did they first call your attention to their asserted requirement for new studios on the East and West Coast?

A. We had no detail.

Q. Even in a general fashion?

A. I had no detail. The first detail I had on the studios and color total is when we got the hard figures in July.

[1841a] Q. J-238 in estimated cash flow includes an item for property and equipment. Does that include whatever colorization at least ITT thought would be involved?

A. It included \$26 million for color based on what Mr. Kenmore had estimated.

Q. Do you have any idea of the basis for that projection of \$26 million?

A. No, except it was a general impression that he received in the industry. I could add to that that I think it was also the general impression in the industry that the cost of color is much heavier than most people anticipated.

Q. Did you inform Mr. Kenmore on the basis of your discussion in November that he had better think hard about that estimate because I understand you were told in a general way in November at least that there would be large color costs?

A. No, I had no reason to question the \$26 million at that point. I mean I would say \$26 million is large.

Q. So you think the \$26 million was within the range that the ABC people were talking to you about in November?

A. This was our estimate based on outside sources at that time.

Mr. GORDON. Would you read the question back?

The WITNESS. I can't refer this to ABC. This was an estimate we received outside.

[1842a] Q. But you saw no reason to change that estimate on the basis of what you had been told in November by ABC?

A. They had not given us a figure.

Q. I understand they did not give you a figure. I thought it was your testimony that they discussed generally with you that there were going to be large expenses for color.

A. That is correct.

Q. You did not see any reason to change the \$26 million estimate that ITT made?

A. No.

Q. Is your answer that you did not see any reason?

A. That is right.

[1847a] Q. Assuming that ITT does not get into the broadcasting industry, does not acquire ABC or some other broadcaster, ITT conceivably could have an interest in trying to develop as a communications company, technologies that would permit broadcast from satellite to home directly?

A. Yes. What that is referring to is the regulation by the Commission and the rules as they are laid out. If you are talking about a technical capability, if we had an interest in it and could develop a satellite that would be strong enough shall we say to go to a home or anywhere else I am sure we would not hesitate to do it.

[1848a] Whether it would be used or not or how it would be used would obviously come back to the Commission.

Q. You would not have interest to develop it if you acquired ABC would you?

A. I don't agree with that.

I can tell you why if you would be interested.

Mr. WHIPPLE. I ask the witness be permitted to complete his answer.

CHIEF HEARING EXAMINER. I think a complete answer to this question would be very interesting.

By Mr. GORDON:

Q. I will inquire further.

Mr. WHIPPLE. I would like him to explain his answer in the interest of a full record.

Mr. GORDON. What is the last question and answer.

(The record was read by the Reporter.)

Mr. GORDON. I have not said I am interested yet.

CHIEF HEARING EXAMINER. I am sure the Commission would be. It will have to be sooner or later, it has to be testified, Mr. Gordon. Let the witness proceed.

Mr. GORDON. I will put some questions to him.

CHIEF HEARING EXAMINER. No.

Let the witness proceed as he sees fit, not the way you interrogate him.

Go ahead with your answer, sir. .

[1849a] The WITNESS. In the first place if we had a satellite that could do this, I am not sure what else it would be developed for, but we certainly would not hold back the development of any other operation or its equipment or our R&D by reason of the ABC's area.

Now we have made the comment in our applications and elsewhere that ABC would operate autonomously and without influence from any of our other commercial activities. The thing you are raising now is the reverse of this, whether ITT's activities would suffer from ABC.

My first answer is no. My second answer is a very solid one and more important one.

Basically you can't hold back progress no matter how you try. If this is what is coming we are going to be up in the forefront. Whether you are going to use it for broadcasting or not is going to be a decision of the Commission, not a decision of the ITT.

By Mr. GORDON:

Q. This is your full answer?

A. This is my answer.

[1857] Q. Would you agree that broadcasting from satellites to the home directly would very materially affect the present structure of the three major networks?

Mr. WHIPPLE. May we ask what you mean by the present structure.

CHIEF HEARING EXAMINER. I think the witness must understand it.

Proceed.

The WITNESS. If you talking about the present structure in the sense of whether they would use local broadcasting stations, if you start with the assumption that we eliminate local broadcasting stations obviously you change your structure. That is like saying if we change the structure to assume that have we changed it and the answer is obviously yes.

By Mr. GORDON:

Q. Would that be some cause of concern to ITT in view of the projected investment of some \$400 million and maybe more in ABC?

A. Well, if you are still continuing with the assumption that the industry would change and you further add to this assumption that you are inferring in a manner that would be harmful that I have to assume if the assumption is true it would be harmful.

[1858] Q. By the same token, if there were a development of wired networks taking signals from satellites right into the home this again could conceivably have an effect on the present industry structure of three networks with owned stations and affiliates.

Mr. WHIPPLE. I will object to the question as being hypothetical. The question assumes something that could not happen. The FCC would have no jurisdiction over the type of broadcasting.

Mr. FITZPATRICK. We did not assume that fact. We were assuming it was permissible and accomplishable. Not that the Commission would have no jurisdiction.

Mr. GORDON. I am not assuming that the Commission has no jurisdiction, either.

CHIEF HEARING EXAMINER. Let us proceed.

Mr. GORDON. Will you read the question back.

The WITNESS. If all the assumptions that have been made including regulatory and the fact that it is feasible and all the other things that were made, it would have an effect on both. Since ABC is in short of affiliates, I would have to say I am not sure that some of it would be positive as far as the networks are concerned.

CHIEF HEARING EXAMINER. Those effects would be adverse, sir.

The Witness. They would.

[1866] Q. I understand ITT's structure to encompass staff executives and line executives and you have group executives and still other types of executives?

A. Yes.

Q. Can you please explain what the internal setup of ITT is in that connection and what the areas of responsibility are?

A. I can't describe the areas but our field areas in Europe and two or three splits of our US areas, our communications areas which are split two ways and some of our specific areas like Avis and such headed up through line executives that we call group executives or function as group executives. Then we have group specialists functioning in anything from legal, financial, technical, who functions overall in the sense of coordination, solving problems, projects like that.

Now, the group executives for the most part would report in to me or, as I might designate from time to time, most of the functional people would report up to a functional head [1867] who would report to me. That is pretty brief, but I think that is what you want.

Q. What do you mean by functional people?

A. I referred to legal, financial, sales, marketing, technical, and so on.

Q. To whom do the Avis people, for example, report?

A. They report to group executives.

Q. How many group executives are there?

A. I would say we must have seven or eight. Something of this order.

Q. Do you have a body of people called product managers?

A. Yes, product line managers.

Q. What are their functions?

A. Marketing and product planning.

Q. To whom do they report?

A. They report to me. Let me say there are groupings of people but the man in charge of the group will report to me.

Q. How often do the line and staff executives and product line managers and the officials you have mentioned meet with you?

A. Some of them I may see on special problems throughout the month or I might get a report from them or a note or memorandum. But basically we meet once a month in New York [1868] to go over all our problems and if I get over to Europe there is some part of this group meeting with the European group once a month and I make a good portion of those meetings.

Q. Now, we have heard reference to an "EAC" committee. Is it a committee?

A. That is the European group, European Advisory, I don't know what the last thing stands for, whether it is committee or what. It is a small group.

Q. Is there another European group?

A. Let me put it this way: That is our advisory group in Brussels. Then all of our separate corporations are national companies headed by nationals under our own policy. They operate within their own countries. Once a month they basically get together, go over their problems and sort them out. In the interim period there are many things that arise that are handled by the local group and the EAC working with the people in the field.

Q. There is some initials of a European group beginning with "S" I believe. It is not EAC.

A. It could be Standards. We have a component sales group that operates around the country under the name of Standards.

Q. Do you regard the organizational set up that you have described as giving you rapid and efficient lines of [1869] communication with the various divisions and subsidiaries of ITT?

A. I think so.

Q. Now, apart from these various groupings, the various ITT subsidiaries may have their own presidents and directors, et cetera, is that correct?

A. That would be true whether it is a division or a subsidiary.

Q. What is the relation of these subsidiary boards of directors to ITT headquarters? How are they supervised?

A. Well, we have several kinds of boards, if you want to go into that. They would vary. That is my point.

Q. Would they be reporting to a group executive or to you directly? In the case apparently they report to you directly?

A. They report up through a group executive basically. Let me put it this way: On any of our—I will have to give you some variation, I can't generalize completely. We have boards, purely legal boards that are non-operating. There is no reporting to speak of except when information is needed. Then we have subsidiaries where we retain the legal entity for some reason, whether it is taxes, licenses or otherwise. They are headed up by a wholly internal board, a wholly internal company and in our domestic areas these are operated pretty much like divisions basically. They would [1870] report up through our group executive. Then we have boards where we are as wholly owned as to the stock but we have outside directors on those boards. These would be largely in the foreign areas and we would have one man on there, generally the managing director, who runs the company who is on the board and who in turn reports much of his activities back to Brussels or whatever his reporting area is and generally up through a group executive.

Finally, we have two other categories. One is where we have outside stockholders as well as inside stockholders and have outside directors and inside directors. Here your real relationship is involving a minority as well as our own and again we have people on there, managing director and president who report up through a group executive.

Finally, what you are contemplating here we have a unique set up that we have proposed in the case of ABC.

Q. Now, I take it, Mr. Geneen, that as a director and president of your company, ITT—well, all the ITT directors owe a responsibility to the ITT stockholders, do they not?

A. Yes, if they are on a board.

Q. And the ABC director, assuming the merger goes through, would have a duty to their stockholders, stockholder which would be ITT, itself, would it not?

A. Yes, but it would be commensurate with their board responsibilities on ABC.



[1871] Q. I am sorry, would you read that answer back?  
(The reporter read the record.)

By Mr. GORDON:

Q. Assuming that there is no element of illegality involved, it is true, is it not, that the board of directors is supposed to act in the best interests of the stockholders of the company for which they are directors, is it not?

A. Yes, that is true. But you haven't defined the best interests yet.

Q. I take it this would be the aim of an ABC board of directors assuming this merger goes through?

A. That is correct.

Q. And in that event the sole stockholder of ABC, the new ABC, would be ITT; isn't that correct?

A. That is correct.

\* \* \* \* \*

[1877] Q. Will you tell us about the contacts between ITT, ABC and ITT's Lisbon subsidiary in relation to the building of television stations in Portuguese Africa?

A. I don't have the details on it but my memory of it is that there was a possibility that some stations would be erected and we asked the International Division if they would have the interest and if so, we would be glad to help them.

Q. Is that the extent of your concern with that problem?

A. I believe that their International Division followed it up to some degree. I don't think anything has come of it. That basically is the important content of it. Our Portuguese Company does manufacture TV's and radios and I assume if anybody did put a station up, there it would create a small market. These are very small towns.

Q. You wanted to have the television sets manufactured by your Portuguese subsidiary, did you not?

A. Well, we might have wanted to do that. Usually, there is not room for more than one in a little market like that.

Q. Do you have any idea that ABC could supply programming to the stations as and when built?

A. I think that is their business. It would be their decision if they wanted to do it.

Q. This is something you had in mind would be a good opportunity for ABC?

[1878] A. We offered it to them as an opportunity for their disposal. They have a division, you know, that works in this field.

Q. Did you offer it to any other television company network?

A. No, not to my knowledge, anyway.

\* \* \* \* \*

[1879] Q. Let me phrase the question this way: It is correct, is it not, that your Puerto Rican and Virgin Islands telephone companies purchase more than 90 percent of this telephone equipment from an ITT subsidiary, manufacturing subsidiary. Is that correct?

A. I was hoping you would ask that question, Mr. Gordon.

Q. Can you answer yes or not?

A. We buy it from a local government development-sponsored subsidiary we have in Puerto Rico.

Q. Then the answer is yes to my question?

A. Yes, but I am identifying it.

Q. If any of the five owned and operated TV stations of ABC, assuming the merger goes through, had unsold advertising time, and I understand they all do, would it not be to the overall financial interest of ITT to run ads for Avis on such unsold advertising time?

A. In my opinion, no, because there is a lot more involved than that. We have already answered it in the hearing. You are talking about the overall interest of ITT—the answer is no.

Q. I am talking about the overall financial interest.

A. The answer is still no.

[1880] Q. Would it not put AVIS's message before the public?

A. Yes, it would.

Q. And would it not give revenues to the station, assuming that they charge Avis the same amount that they charge anybody else?

A. Yes, it would. It would make us subject to a lot of questions at the licensee level.

Q. You mean it may not be to the overall interest, financial interest, of ITT if it would raise concern whether you would transgress in the terms of your license?

A. That is right.

Q. But if it did not, then I assume your answer would be that it is in the overall financial interest of ITT?

A. That is hard to answer, Mr. Gordon. We run all our Divisions on a pretty autonomous basis on P&L. They would advertise what they felt was normal and right. I think in the hearings, Mr. Goldenson, who would also be autonomous, has already testified he would charge anybody that came in at the full rate.

Q. It would be going out from one pocket into another pocket of ITT?

Mr. WHIPPLE. I object to that. That is an oversimplified question for a matter of this magnitude.

The WITNESS. They are not going to spend the money unless they have need to spend it and they are going to spend it [1881] on the most competitive basis. Mr. Goldenson will charge us competitive rates.

By Mr. GORDON:

Q. You mean you will expect ITT will place its advertising over other networks than ABC assuming the merger goes through?

A. I expect he will place it in the most competitive manner he can.

\* \* \* \* \*

By Mr. FITZPATRICK:

[1888] Q. Now, when was the first time that ITT became interested in the possibility of acquiring television broadcast stations?

A. In any specific sense, it would probably be with Mr. Graham in respect to the Travelers Station that we talked about.

Q. That was the first interest?

A. Yes, that I know of.

Q. Did you make some decision then as to what you might be interested in if the situation arose?

A. No. We already had learned a bit at that point. Mr. Graham, who had come out of RCA, had drawn an impression

of the field. I don't recall who first brought the attention of WTIC to us but I think it was somebody in the Travelers organization.

That would be our first interest. As I said this morning, [1889] we pursued it awhile. The price seemed very high. They were very adamant in their figures. Eventually, I, personally, killed the project.

Q. If I might direct your attention to J-138, Mr. Geneen.

A. Yes.

Q. That is an evaluation report prepared by Kuhn, Loeb, and Company. It is an evaluation of Travelers Broadcasting Company. Now, was that prepared at the specific request of ITT?

A. I am sure it was.

Q. Now, that is dated September 26; would it indicate that at least sometime prior to September 1963, you had some interest in acquiring broadcasting facilities?

A. Yes. I have not tried to fix an exact date because this is the way it developed.

Q. Was it sometime before September?

A. Yes, it obviously would be.

Q. Now, you testified this morning, and correct me if I am wrong, please, that in any negotiations with Travelers that Travelers was asking for \$35 million?

A. That is my memory.

Q. You people wanted to offer less?

A. There were other problems. As I recall, they were interested in not cash, I think they wanted senior debt and a [1890] few other things of this type that we were not prepared to even consider.

Q. It was not a question of the price as much as the payments?

A. It was also a question of the price. As we studied it more and more, as I said this morning, we finally got to the conclusion it was a question of what kind of investment this would be for us.

After all, it was one station and we had no basic philosophy that would carry us any further.

Q. Will you direct your attention to the next document, J-139?

Mr. GORDON. May I have the last question and answer read, please?

(The record was read by the reporter.)

By Mr. FITZPATRICK:

Q. Do you see that that purports to be a document dated October 1963, indicating it is a draft, it says, 9, 25, 63. It is addressed to Travelers. Correct me if I am wrong. It appears to me at least to be a draft of proposed agreement being offered by ITT to Travelers for the purchase of the station.

Does that refresh your recollection in any way?

A. I said we were talking about these amounts all through here but I am sure we never gave them this offer. I don't recall [1891] it anyway.

Q. Do you have any recollection as to whether this proposal was ever sent to Travelers?

A. I don't think it was.

Q. The amount specified there if I might direct your attention to the third paragraph on the first page, is outstanding capital stock of TBSC in consideration of issuing to you \$35 million principal amount, ITT, and then there is a dash with a percentage left vacant, convertible subordinated 20-year debentures, and then it goes on with respect to the type of stock to be issued.

Now, was there a proposal, at least internally in your organization, to issue this type of stock?

A. There was a proposal internally. That is the point I was making. If my memory is correct, Travelers had absolutely no interest in anything subordinated.

Q. They had a different proposal?

A. Yes, they did. They had a different asking price.

Q. What I am trying to determine, was the difference the question of whether it was \$35 million or some lesser amount or the method of payment of the \$35 million?

A. I think at that particular time, we were talking in terms of 35 and our method. They were not accepting it. We didn't get any further. As time went on, we just decided it was not the right answer for us.

[1892] Q. As a result of this negotiation in September and October——

A. Bear in mind this has never been approved by us. This is purely at our own internal levels.

Q. I understand that. I did not ask that question. Now, sir as a result of the negotiations with Travelers, was any decision reached at your level as to whether or not ITT would be interested, if they were to go into TV broadcasting, of having group-ownership of more than one station?

A. I think this was the kind of thinking that we would be involved in, that if we were going to go into it, it would make more sense to get a sizeable entry or not go in.

This at least was my thinking.

\* \* \* \* \*

[1894] By Mr. FITZPATRICK:

Q. Sir, dealing with the Federal Electric Corporation, as you use the definition, is that one of the ITT autonomous companies?

A. Yes. When I say autonomous, it is one of our wholly owned companies which we operate more or less like a division.

[1895] Q. Now, sir, you say you run it like a division?

A. Yes.

Q. Are your divisions autonomous?

A. To a large degree.

Q. You have defined for the Commissioners, and I am referring now specifically to transcript page 552 of the transcript during the September 19-20 hearings, referring specifically to lines 22 on page 522, and you are defining their autonomy.

You say:

Autonomy is a delegation of authority generally within an agreed sphere of operating policy and it works on a basis of continuous information and review which means that it is constantly updated as to the policies.

Then later on the next page you give another further explanation of autonomy and I am referring to line 8 on page 553. You say:

Autonomy is a controlled operation but within a framework which makes sense as I tried to describe it, in day-to-day operations, operating decisions, short and long range planning, agreement on overall policies, the need and duty to be informed both ways.

Then so that there will be no uncertainty I am sure as to what the Commission understood you to mean by autonomy you said on the same page and more specifically on line 24:

The real definition, if you are talking about autonomy as the one I just defined, is the ultimate responsibility in [1896] ITT Board, the delegation of authority within agreed policies, plans and so forth and the constant interplay of information which means that it will work or, if it did not work, it would immediately be subject to minor correction or whatever adjustments or understandings would be.

Now, sir, is that how ABC is run according to the definition of autonomy?

A. Pretty generally. You can't pick a specific area. Generally speaking, they run most of their affairs on their own day-to-day basis. Occasionally they have problems and we get together with them.

Q. Will you define what you mean by getting together with them?

A. Mr. Vollbrecht is a group executive. If he has a question of policy he would take this up with Mr. Chasen or whoever is in charge at that particular point and they would develop their answer.

Q. If there was any difference of opinion between Mr. Chasen and Mr. Vollbrecht and they didn't want to pass it up the line for your decision, who's decision would be decisive as between the the two of them?

A. It would be Mr. Vollbrecht's unless Mr. Chasen insisted it would be brought up in which case it would.

Q. It would be yours?

A. That is right, I would have to review it.

\* \* \* \* \*



[1900] Q. On wholly owned companies outside, let us talk about within the United States, do you have any presently wholly owned companies of ITT where outside directors are the majority of the Board of Directors?

A. No, I think I said this morning in describing these what we were proposing on ABC was completely unique.

\* \* \* \*

[1907] Q. Now, sir, in your prior testimony at page 167 of the transcript, line 6, you said that "The proposed method of operation of ABC as a substantially autonomous subsidiary, with the present ABC management and its distinguished Board of Directors, is harmonious with the present ITT management system and can be carried out in a manner contemplated in the application in full accord with ITT's responsibility to the public and to the FCC."

Did I understand correctly that this Board that you propose here is unique in ITT history?

A. I think so. Do you want me to comment?

Q. No, that is sufficient.

Now, sir, you will be a member of the Board of Directors, will you not?

A. ABC?

Q. Yes.

A. Yes.

Q. Mr. Perry will also be a member?

A. That is correct.

[1908] Q. Would both of you also be on the executive committee?

A. Yes.

Q. Now, sir, where will the decisions be made with respect to the operations of ABC's let us say, O&O stations? Will that decision be made by the ABC Board of Directors or ITT or whom?

A. Made by ABC management and to the extent that they normally report it to the ABC Board for approvals or whatever they need it will be made at that level.

Q. With respect to the various activities of the ABC network, what will be the function of the executive committee as it relates to the operations of the network?

A. The executive committee of ABC?

Q. That is correct.

A. My impression of the executive committee is a meeting of a smaller number of the Board at intervals between the Board meetings to expedite business that would otherwise have to wait for the Board.

Q. That has various lines of authority on decisions delegated to them?

A. I would think they have the same powers of the Board.

\* \* \* \* \*

[1915] Q. Did you plan on being on the program board?

A. I was going to say I don't know anything about it. I doubt it very much. I think I will limit my official connection to the Board. If I might volunteer something it [1916] might be helpful, Mr. Fitzpatrick.

I would just like to point out that the chain—you were talking about the autonomy problem—the chain of reporting of the ABC Board is very unique in our setup. The Board reports to the ITT Board. There are no group executives inbetween. Mr. Goldenson himself reports to the ITT Board. I thought I might point that out. This is quite unique.

Q. In creating this unique situation are you representing to the Commission that you won't use any of your group functions within ITT on a day-to-day basis?

A. No. Let me say in Mr. Goldenson's letter of March 18 which he wrote to us I think you will find he has some specific paragraphing there where he says he will assume—first he pointed out that both companies are in the same city and they could have very effective liaison for all purposes but he points out in there that he would assume there would be interchanges of information, help back and forth, without in any way interfering with the independent day-to-day operation of ABC.

I can give you an example of one of the things we are trying to help him on now. It may be someplace they can help us in marketing and so on. But they have a very heavy data processing problem. We have a lot of background in this area.

So we have attempted to help them with their data processing. This is the sort of thing I am speaking of.

\* \* \* \* \*

[1919] Q. It says here and I am reading from the material filed with the transfer application attachment C, ABC television network, page 4, and it says, "The final schedule," talking about the TV schedule, "is ultimately approved by the company's executive vice president and president and by its board of directors who must authorize the financial outlay necessary to produce the programs which have thus been approved."

As a member of the board of directors you will, and Mr. Perry will, play your parts in authorizing and approving the program schedule; is that right?

A. As two of 16 votes.

Q. You intend to actively participate in that aspect of the corporate activity?

A. Unless there is some feeling on the part of the board that we should not. My feeling is that you are talking about a financial approval there and that is what we would be approving. If you are talking about our judging, you might say, the artistic content or something of the programs, I don't think this would be an area that we would be qualified in.

Q. Would there be any reason for any other members of the board of directors of ABC to feel that either yourself or Mr. Perry would not be qualified to participate as legal active members of the board of directors of ABC?

[1920] A. No.

Q. So you intend to participate in all activities of the board?

A. Yes. I am explaining my views as to what we would be approving.

Q. As a member of the executive committee of the board of directors, will you actively participate in voting upon and approving or disapproving the various outlays of money for the specific programming to be presented by the ABC television network?

A. Yes, I would if it is presented in that manner.

Q. That is one of the functions of the executive committee, is it not?

A. Yes. All through the board, I think, it is the same question.

Q. But the executive committee will make these decisions on the alternate two-week period?

A. That is what I understand.

Q. Now, sir, what is your understanding as to whether or not if ABC presently wants to have a documentary, let us say, dealing with Puerto Rico and Mr. Secondari proposes to Mr. Moore that they ought to have a special one-hour or a series of two or three hours on Puerto Rico, "The Crown in the American Jewel or is it Another Possible Cuba," what part would you play in the executive committee meetings in [1921] resolving the question as to the financial outlays for such documentary?

A. You are assuming that this item comes to the executive committee?

Q. Yes. What is your understanding as to whether it does or not?

A. My understanding is that most of these things do not come as editorial items to the executive committee.

Q. Do they come as a budget item?

A. Maybe a total budget for the news department or proposed budget for something.

Q. Do you know whether as a matter of practice that ABC presently—if a documentary, let us say, costing \$1½ million is to be made, whether or not that requires action by the executive committee?

A. No, I really don't.

Q. Would you assume with me that it did for this question. As a member of the executive committee you would participate in making a decision as to whether such a documentary would be made, would you not?

A. Yes, I am mindful though of one thing we have said all the way through here. We have absolutely no intention of interfering with the editorial content of news or any of that department. I am under the general understanding that most of these decisions are made in the news department and [1922] not in the board meetings or the executive committee.

Q. I am not talking about the editorial content of the program. I am talking about the initial decision that must be made to expend the money and have the program in the first place.

A. I understand. All I want to say is that if I have any question in my mind as to the propriety of my vote in relation to that pledge, I would not vote.

Q. How can you explain that, Mr. Geneen? As the chairman of the board of directors of ITT won't ITT be responsible to the public and to the Commission for what goes on as an operator of television stations in the US?

A. That is correct.

Q. Are you going to abdicate that responsibility on the executive committee?

A. No, I am not.

Q. What are you going to do?

A. I said if I have any feeling that there was any impropriety I would not vote.

Q. Do you envision any impropriety?

A. No. This is a great issue and I am saying I am conscious of my responsibility here.

Q. I would like to have you explain for the Commission on this record, can you foresee that there are any situations where you would not perform your duties as a member of the [1923] executive committee of ABC?

A. No.

Q. Do you feel that would be equally applicable to Mr. Perry?

A. Absolutely.

\* \* \* \* \*

[1928] Q. So there will be six of you on the ITT board who will be also on the ABC board?

A. That is correct.

Q. Let us assume that you six stand together as one against the other ten members on an important policy question with respect to the operation of ABC. Will the usual methods of board of directors operations be controlling and will the ten independent outside members decide what is going to be done?

A. They might but I would think if there was any question, that could be brought up to the board at the ITT level and should be if it involves any public interest and the decision made there because this is where the ultimate responsibility is.

Q. Who will determine what has to be brought up to the ITT board?

A. I think as a matter of operating relationship if there were any serious question it would go up.

CHIEF HEARING EXAMINER. Who makes the determination?

The WITNESS. Mr. Goldenson as the chairman, I am sure [1929] would immediately ask to have it brought up.

By Mr. FITZPATRICK:

Q. How about yourself? Let us be realistic.

A. I would make my request to Mr. Goldenson because he is chairman of the ABC board and he is on our board. I would have no hesitancy in feeling, if there is any question, it would go up.

Q. Is that the understanding you have now?

A. I haven't put it this specifically, but I am sure it would.

\* \* \* \* \*

[1939] Q. Can you give me the specifics as to what are the technological advances that would accrue to the communications industry and ABC in particular by virtue of this merger?

A. The communications industry is a broad industry which would encompass more than the broadcast industry. We are in that field very heavily all over the world. With \$180 million worth of R and D that you mentioned, I can't give you a good [1940] breakdown from memory but I would have to say that the largest portion of this is in the communications area as is most of our activity.

Now, I did say also in the hearing at another place that according to our technical director—I don't know whether I quoted him but I was referring to him.

Q. Mr. Cookson?

A. Mr. Cookson, that we spent about \$30 million a year on what you would call high frequency radio areas, much of this for European purposes. He felt that with the increment of three to five million dollars of additional expenditures, much of the fruits of that work brought up to this point and applied to our products could be turned and devoted to the broadcast areas because we had no particular interest in this field up to that point.

I asked him, I said, "How would you equate the value of this combined endeavor of \$30 million now in our area and much of it with a cross application to the broadcast field with the incremental expenditure of three to five million dollars", and I have to say this is a roundhouse figure on his part but he felt it might be the equivalent of adding about \$15 million a year,

you might say, of R and D devoted to the broadcast industry. I don't remember whether this is inherent in my comment at that particular point but this also was put on the record at that time.

[1941] Then there was a particular area which I was interested in and talked a little about in the hearing which got over into the UHF area. I am prepared to say a few things on that if you want me to whenever you are ready.

Q. Other than what you have said as to plowing into R and D some more money and the benefits that would accrue from the present R and D you are doing, what specifically, so that we can make a finding if possible, what specifically, if you are technically qualified to state it or you have the knowledge, can we look to now as to any benefit that would accrue from this merger with respect to television broadcasting?

A. Leaving out UHF or including it?

Q. Let us leave it out for the moment.

A. Cookson should answer this better than I because he knows the areas and how the capabilities would apply.

Q. Would you defer to him?

A. I would because most of the things I have been following with Cookson have to do with the UHF area which concerned me very much in relation to the ABC problem.

Q. Will you tell us what your understanding is of what benefits there would be to UHF by virtue of the ITT merger here?

A. Let me go back and start with the hearing. In the hearing, we identified the interest we had basically in some transmitters, at that time unexplored, that we were making [1942] abroad. We had some diodes and varastors that we felt if used by set manufacturers throughout the U.S. would enable you to get the UHF signal right on the regular tuner which is part of the problem of getting the viewer to watch UHF which in turn, generates the need of the station and the network.

Since that time, we have actually gone into the question of what we had to offer in the way of this equipment. It is our impression that the 55 kilowatt transmitter that we had abroad, which we are making a few minor changes in, is ahead of anything over in the field here.



It is all solid state except for the power tube which eliminates some 50 tubes in a 55 kilowatt transmitter. As a matter of fact, you can link two of them together and get 110 which with an antenna of the type which prevails will get you up to the full 5,000 kilowatts of radiated power you talked about for the UHF the Commission approves.

Now, in combination with that, which Cookson can give you better detail on because I had him go into this area, they have quite a lot of capability in the communications field in the remote operation of stations.

His feeling is with the more reliability and eliminating 50 to a hundred tubes and using some of our techniques in the remote areas that the ability to have unmanned UHF transmitters, becomes very feasible with high quality performance.

I don't know how you would estimate the value of this to [1943] a UHF station. His rough calculation would be 40- to 50 thousand dollars a year with a three shift operation. In the case of the varastors and diodes we spoke about before, we have since the September hearing approached all major set manufacturers.

There is a great deal of interest exhibited on their part. Whether they will feel that the cost differentials, which we don't think are severe, will warrant their moving in this direction, we are not sure.

But at this moment, as we were at the time of the September hearing, we are the only company that we know of that has developed and are offering this kind of diode and varastor, which would enable you to put the UHF and the VHF right on the click tuner.

I want to say one other thing which I think is very important. The other area that we have been into which ties back to our communications company background is the whole problem, and you might call it a combination of technical and economic, the whole technical-economical problem of getting UHF going in a community.

This is of particular interest to us because of all the facts brought out in the hearing as to ABC's need, but more importantly, if you can open up UHF, this answers some of the ques-

tions that were also raised about the fourth network and ability for other, you might say, stations to come in whether they are educational or entertainment.

[1944] Here is a problem which we think we can bring a lot to bear on as a systems, as we would call it, systems contractor or going back to our experience. You have the viewer who at the moment, perhaps, if you are talking about distance beyond the center of town where a UHF signal would need some kind of amplification and possibly, frequency conversion on his set in order, at the extreme limits of VHF reception, to get as good a picture—actually, it is our belief and Cookson can give you the details on this, that a UHF signal out at the maximum level of the VHF receiving can be as good as VHF if certain steps are taken.

This is a technical-economic problem, you have the problem of convincing the viewer to spend maybe up to \$50 to upgrade his set if he is beyond a certain level and he is not going to do this unless he has a signal that is going to reach him and he has a network that will be putting a program on that he is interested in receiving.

You go to the UHF station—very few as we see it are anywhere up to the radiated power limit you have allowed them to have. Again, their interest is curbed by the fact there are not enough viewers and they don't have a need to get to them.

Finally, you get to ABC where you have the problem that they are not interested in going to the UHF station if it is not going to give them viewers and a good enough piece of [1945] equipment to get the signal out.

Now, this may sound like I am complicating it but actually, in going into a pilot community, there would be many problems, terrain, antenna heights, we think that somebody with the overall systems approach could take a community and identify these problems, learn how to handle them and go through one real program of setting up and converting an entire community over to UHF where in fact, you would have UHF signals at the outer limit as well as the inner limit just as good as VHF and you would have it on a click tuner so it is just as convenient, so we would finally get to a completely competitive UHF signal.

If this were done in that same community, it answers all the questions you raised in the hearings about fourth network capability and ability of education and other things that would come up. This is a kind of unique capability to do this.

[1946] Q. Now, sir, with reference to the diodes and the varastors, with respect to the development your company has been able to achieve you have made that knowledge available to the set manufacturers under patent?

A. We said in the hearing that we would be doing this anyway. This is a business venture. These other things would not be of much interest.

Q. So the click tuner is available and that research would be available to the public regardless of the merger?

A. That is right.

Q. The system approach you made reference to that is what you are saying in effect would be made available possibly to the television industry?

A. Yes, it would. I would like to make a comment.

As far as ABC is concerned they have not necessarily accepted this. This is some work we have been doing on a rather low level pending the merger going through. I would think as a company interested in their own P&L they might accept or reject. We would have to prove it to them as we would anybody else.

Q. Do you have any specific proposal for this pilot community utilizing the system approach to improve the technical operations?

A. We have not done it except a block-out indicating our complete belief that we can do it. You will notice that [1947]—let me put it a different way. Our findings at the moment as I have pointed out seem to imply that if you have a competitive capability for VHF and UHF—let me put it the other way around, UHF as good as VHF in the receiving set, all these things we are talking about are possible.

At the present moment the standards in the all-channel as they have been explained to me are not so competitive that the UHF signal gets the same buildup and receptive strength.

At the end of 1968 where you will have practically 50 percent saturation of all-channel sets now, and you could not change the chassis on model lines much before that, all of those sets will probably need, if they are out beyond the real close areas of UHF, will probably need some upgrading.

One of the questions that will develop out of this might be an interest on the part of the Commissioners as to whether the all-channel built at some point ought not to be equalized in the sense of having manufacturers recognize that the UHF signal has to have the same capability in strength as well as convenient in tuning as the VHF.

This is all part of a really enterprising new approach to try to meet the UHF problem which I suspect is part of the Commission's, one of the Commission's major future problems.

Q. Now this chassis upgrading is a set receiver probe, is it not?

[1948] A. That is correct.

Q. You people are not in the set receiver business or manufacturing business are you?

A. We are in Europe but not in the U.S.

Q. Do you plan on going into it in the U.S.?

A. We have no present plans.

Q. How would you make available any of the knowledge of technological advance with respect to chassis upgrading?

A. We are already calling on manufacturers making these things available to them. As far as patents are concerned we have a general patent policy of licensing most everybody but we take up each case separately.

Q. The systems approach and pilot community, you do say that ITT has the capability of going into it?

A. Yes, we have.

Q. Do you see this as being a mutually exclusive problem that you would only go into if you got ABC?

A. I can't really answer that. I would say that our first interest would be because of ABC. I think I would also say that if it were not for ABC without having made any studies I am not sure we would go into it.

In other words, I am not sure it is really a profitable operation in the sense of what we could do with our activity. Once you got into it you would learn a lot more about it and it might be that we could do a lot of things or I think also [1949] once you set an example like this there will be many people who can follow it.

I want to qualify, I have no technical background. This is my reviews with Cookson over the period of the past year where we have been highly interested in what we could do once this is accomplished as a merger.

Q. Do you plan on developing this chassis upgrading and utilizing it in your European set sales?

A. Yes, they are already offering it over there. I don't think their problem, I can't speak now as to their hands over there but they have a lot more UHF I think than we do. This is why we are making the UHF translators and transmitters.

Q. Do you plan on exporting any of the set manufacture in Europe to America?

A. No.

Q. Meeting U.S. standards?

A. We have no plans. I don't think it would be economically competitive.

Q. Are you representing, Mr. Geneen, to the Commission that were the merger to be granted that ITT plans undertaking this system's approach in a pilot community with respect to the study of technological and economic problems relative to UHF?

A. I am saying based on our studies to date we would be interested in doing it. As I said before I think we would have [1950] to sell the station owner and ABC. No one in effect has underwritten anything for us at this point.

Q. Would you explain how you would sell the set owner before you undertake the R&D work?

A. See if I can draw the technical economic problem together. If you have a community with a hundred thousand people, say 30,000 homes, and you had two VHF stations and one UHF station, I assume you have various problems of terrain and distance.

The first problem you have is that you have to be the catalyst to bring together a signal that will reach out, a set that will receive it on a competitive basis to the VHF signal, and some programs to put over the station.

You have three different entities no one of which is interested unless the other two are. If you are a set owner and I suggest that it might cost you \$25, \$40, \$50 or something to get an upgrading of your antenna and automatic frequency converter and amplifier so that you can click tune this, your first question is what am I going to get.

Somebody has to be able to say if we are successful in getting 20,000 out of the 30,000 homes here we can assure you that we will have a station that will get this out to you and a network feed that will give you a program to watch.

When you go to the station owner he has the same kind of questions, where are my viewers? When you go to the [1951] network you are saying where is the station and viewer. It is a pretty complicated balancing problem.

Q. Under the Commission's present rules ABC has at least the right to request of the Commission authority to construct and operate two UHF stations, do they not?

A. I believe they have.

Q. Would it be your plan that if the merger was effected that the ABC division or subsidiary of ITT would, itself, request and construct a UHF station and undertake this research?

A. No. We would offer it to ABC. But they are autonomous, they might turn it down flat.

Q. If you can't convince your own subsidiary to do this do you think you are going to convince somebody else?

A. I don't know that we can't. We haven't gotten their agreement and approval and we have not presented it to them.

Q. Isn't the entire cost you have mentioned for this chassis upgrading of approximately \$50——

A. Yes, that was the set in the viewers house.

Q. Isn't that too large an item in comparison to the actual present costs of the black and white set?

A. That is one of the things we have to determine. Actually what you are saying is if you could bring a third complete

program to a community which would be the end result of this. that you certainly have added a lot to the public [1952] interest in that particular community. You are talking about color. When I said \$40 to \$50 I am assuming that the installation man and so on is charging something for it. I think the actual material involved which would be a UHF antenna which they would need and some kind of frequency converter, very small solid state frequency converter and amplifier about the size of a package of cigarettes I don't think the equipment cost would run more than half.

Q. Does this whole thing lie in the improvement of the set?

A. You can improve the set to the nth degree but if there is no station with 5,000 radiated kilowatts of power, and that is what it needs to get out there, if there are no programs to come out, no one wants his set upgraded because there is nothing to see.

Q. Aren't there a number of UHF stations presently operating with programming and giving out a signal where this type of research has been conducted?

A. I haven't done enough research to give you the answer to this part of it but I am under the impression that ABC, for example, is sharing in about 65 locations because there is not an adequate outlet for them apart from taking partial, you might say, partial distribution on the existing UHF stations.

Q. Is the only improvement to the UHF through the set [1953] receiver or do you plan on spending and exerting efforts with respect to the improvement of the television transmission signal and the transmitter itself and the antenna being used?

A. We do.

I have already pointed out that we have this advanced 55 kilowatt transmitter. We have an advanced transmitter we call a satellite station. Both of those we are going to distribute in the U.S. through an outside distributor. We have put in the works an upgraded version of the transmitter which will eliminate two of the remaining four tubes.

[1954] Mr. GORDON. Will you read back the last question and answer?

(The record was read by the reporter.)



By Mr. FITZPATRICK:

Q. Directing your attention if I might to your further testimony on Page 170, you are making reference starting at Line 10 as to the benefits that might accrue from the merger. You say it will enable ABC, one, to innovate a program service.

Now, sir, I ask you what do you plan on doing in the event of a merger in the area of programing innovation that ABC is not presently doing?

A. This refers to financial support, Mr. Fitzpatrick, and I think he pointed out that with a broader base where he was not bothered by fluctuations in his ratings and markets and so on he would have the ability to plan further ahead and be able to maintain his planning and also to move into areas which might be more in the public interest and be of a type that if his earnings went down, he might have to cut back down himself, but with a larger backstop in the form of our financial support that he felt he could continue.

As you go on down this—that was the nature of that particular area.

Q. In your evaluation of ABC in making the decision to offer the exchange of stock as you did, did you satisfy yourselves [1955] that the ABC management was in fact, engaging in program innovation?

A. I think they have a record of doing that.

Q. You have been satisfied with what they have been doing?

A. I would be, yes.

Q. Now, dealing with the second point that it would permit ABC to present more spectaculars, would that be the position of ITT whether such spectaculars were profitable or not?

A. We would support ABC in their judgment of what they wanted to do.

Q. You would leave to ABC to tell whether they wanted spectaculars?

A. Yes, we would. They know they have the support.

Q. Have you discussed this with Mr. Goldenson in presenting non-sponsored spectaculars?

A. No, I have not.

nishing the services to the networks, you will take a [1961] position sitting on that board, will you not?

A. Yes, I doubt if many of these issues, although there could be some that reach the ITT board level, but most of these would be carried out by ITT WorldCom on a divisional basis, where they would be privileged to do exactly the same—put forth their best position.

Q. Are you saying that the possibility of the matter coming before the ITT board is out of the question?

A. I don't think it is probable, but it is not out of the question and in our opinion, our position would be that there are two companies involved in an area of regulatory control, and we would insist that they each take their independent positions to the utmost degree.

Q. Now, sitting on the ITT board, if the matter had to be decided by the ITT board, would you vote on this matter?

A. I would vote the way I have just expressed myself.

\* \* \* \*

[1970] It would be ComSat and the carriers, and could Mr. Westfall have an opposing position representing the carriers and ComSat, and what would I do. My answer is that I would ask him to take his independent position.

I would insist that ABC did the same, and this would finally go to the Commission, in my opinion.

Q. You would say to Mr. Westfall, "You make the decisions for ITT"?

A. No, his recommendation would be in line with his own responsibilities with the carriers. The affinity of the two groups, the carriers and ComSat, are related, because actually ComSat is only in a sense replacing what used to be our long line, whether they were cable or microwave, so you have a carriers' carrier concept, working with the carriers and the so-called authorized users.

[1971] Then on the other side, you have customers and ABC is one of the customers. So I would say ABC should take their independent position as a customer, and they would probably be, in my opinion, if this was involved, against both ComSat and the carrier, because there is no way they can get the service except from ComSat through an authorized user.

So I look at these as two groups who would take their own independent positions. I think that you are thinking in terms, would there be three groups.

Q. No, I was talking of two groups.

A. All right, I would then recommend Mr. Westfall who represents the common carrier we have, which is in turn part of the whole system of the carriers' carrier ComSat and the carriers take their position and ABC take their position as a customer. There may be other customers.

Q. You played a role in arriving at ABC's decision, did you not?

A. Yes, I did.

Q. But you will play no role in arriving—

A. No, no, I think that I said the policy we would set, and maybe I am not being clear, is that each of these groups must take their independent position. When Mr. Westfall comes to me and he says "We want to fight against ABC", or anybody else, I would say, "Go ahead, and put your position before the Commission?"

[1972] If ABC said "We don't like the carriers or we don't like anything else," by all means, go ahead.

That is the role we have taken.

CHIEF HEARING EXAMINER. You have a similar role with your other subsidiaries, a similar procedure with reference to all of your other subsidiaries, or is this a special case?

The WITNESS. Well, you might have a similar role, but this is a very special case, because you are talking about two companies in the regulatory area, that must conflict finally before the Commission.

I am just saying as a matter of our position and our self-interest, we would insist on this independent position by both of them. I think that we had a recent case, and I don't say that this proves anything at the moment, where the common carrier group took an entirely different position than ABC.

I think this had to do with the television satellite just recently, that the Ford Foundation proposed. I could add something else, Mr. Fitzpatrick, which might not help your thinking

but I could assure you that our two votes on ComSat have never swayed anything.

That is the truth.

By Mr. FITZPATRICK:

Q. You haven't stopped trying, have you?

A. It is good for them.

[1973] CHIEF HEARING EXAMINER. Let us proceed.

By Mr. FITZPATRICK:

Q. There are instances where the position taken on the ComSat board in getting ComSat's position, what it should be vis-a-vis the user, could arise as——

A. Now, we have a different kind of a regulatory problem, where we have a minority interest on ComSat that is in opposition to our own carriers. Again I say our influence on ComSat you can almost write off, and we would take our independent position as a carrier.

Q. Do you also have a position where you as a member of the board of directors on ComSat could have a problem as between ComSat and the users also?

Can't you envision that?

A. Yes, I can but I think our responsibility would be minimal because of our basic position there. On ComSat, you have 15 members, and we are only two.

Q. Now, getting to the area of the satellite capability, and satellite development, is ITT presently engaged in research with respect to satellite-to-home television in any way?

A. I don't know of any specific project on that, although some of the work we are doing could be adapted or applied to it. Now, Mr. Cookson can give you a much better answer than I. I know of no specific project.

Q. You have stated to the Commission on Page 173, in [1974] Lines 11 to approximately 14, "We believe", and we are talking about a possible conflict between a user and a carrier, where they have duality of identity, and you said:

We believe it should also be noted that the Radio Corporation of America has long provided an intimately successful example of the technological and other

benefits to the public which can flow from the licensing of a single corporate entity to engage in both domestic broadcasting and international communications operations.

What did you mean by that, sir, that you are aware of the internal operations of RCA, and that they have been able to resolve all of their conflicts to the best interests of the public?

A. No, I think we were implying that the technical things that they have developed have found their way into improved service to the user.

Q. You also said in Lines 17 through 21:

And we believe that it is obvious that both RCA's communications activities and its broadcasting activities have been fully compatible, and have been fully responsive to meeting the public interest in their respective areas of communications.

Now, are you familiar with all of the instances, so that you can represent that the broadcast activities have been fully compatible?

A. I would have to say no, except that I have never seen anything that would indicate otherwise. It may be that [1975] I am not properly informed.

Q. You represented to the Commission on Page 174, Lines 18 and so on, that "it was not ITT's own current intent to be directed to the ownership of competing mass media, such as newspapers and magazines and so on.

Were you representing to the Commission that it is the present intention of ITT not to acquire any magazines or newspapers?

A. Well, I made the comment that we have no present interest and in the broad context, I doubt if we would. I did make the point and I don't know whether it is here, that we do have an interest in the training and educational areas, and I did not know how they qualified as mass media.

I doubt if that is what they had in mind.

Q. Wouldn't the merger with ABC result in ITT having a direct ownership in three nationally known newspapers with circulation of 800,000 or more?

A. ABC has three farm newspapers, which they have had for a long time. I don't think that our position would change the structure or relationship, if you will, as far as those three farm papers are concerned.

Q. But the merger itself will actually put ITT in the newspaper business, won't it?

A. Yes. I guess you would have to say in an indirect way, this would be true, but again I draw your attention to [1976] the autonomy of ABC and this would remain as a part of their operations.

Mr. FITZPATRICK. I move to strike the last section.

CHIEF HEARING EXAMINER. It will be stricken.

By Mr. FITZPATRICK:

Q. You have stated, sir, and I am directing your attention to Page 176, Lines 17 through approximately 20, you say in addition as "Professor Sonya has pointed out in his analysis, ABC will be far more important to ITT than any of its other subsidiaries or divisions."

Now, let me ask you, will ABC as far as earnings is concerned be more important than your European operations under the directorship and leadership of Mr. Dunlevy?

A. Well, you are grouping a number of operations, when you talk about our European operations.

Q. Let us group them and answer my question.

A. Well, if you are saying, will ABC be bigger than half of our company, or 40 percent of our company, obviously, the answer is no.

This statement was made in the context of each individual company representing our company there, and in some cases, a few small companies scattered in with it, and that is the context in which it was made.

[1977] Q. Well, let us take West Germany. As far as earnings are concerned, and not sales, will your interest in West Germany be greater than or less than the present earnings of ABC?

A. Considerably less than the present earnings of ABC.

Q. Will that same answer apply to your earnings as it relates to France?

A. Yes.

Q. And taking each of your separate European interests as they relate to the countries, each separately is less than ABC, but in the aggregate it will be more?

A. That is correct.

Q. And that would apply to the United Kingdom?

A. Yes, individually it would be considerably less.

Q. And does Mr. Dunlevy have supervision over the United Kingdom?

A. Yes. When you say supervision, he is in charge of our Brussels office, and each of these companies is run by their own management and this is a coordinating operation we carry on from Brussels. So we look on these as individual companies.

Q. Now, you have made reference to the fact that ITT and I am referring, sir, to page 178, lines 2 and 3—you made reference there to the fact that ITT has engaged in very [1978] little television or radio advertising in the United States in the past. Now hasn't your television and radio advertising increased as a result of your Avis interest?

A. Yes, it has. I believe it is practically all spot television, number one. I don't have any current figure in mind, but we have some figures in here, which show the figures for 1965 and 1966. I don't know what their figures for 1967 are, but since Avis is growing, I would assume that their advertising is growing. But I don't believe any of it is network television.

Mr. FITZPATRICK. Mr. Examiner, the ITT organization has furnished me with statistics on the actual 1966 expenditures, and I can't find them presently, but I will find them again or check with ITT and we will put them in the record.

The WITNESS. They are growing, and there is no doubt they are larger, but I would say any figures they will reach for quite some time would be in your category of pretty minimal, from the standpoint of total television advertising.

By Mr. FITZPATRICK:

Q. Sir, you have stated, still on page 179, and I am addressing myself to line 13, you say, "In addition, I can assure the Commission that the merger will not preclude any manufacturer from competing on an equal basis to supply ABC's require-



ments for equipment on the ordinary commercial criteria of superior quality, suitability, efficiency, service [1979] and price. This is the way in which ITT subsidiaries always operate, and we believe that it is the only possible basis of operations for a diversified company such as ITT."

A. I am missing the reference.

Q. I read from lines 13 through 20, page 179.

Mr. WHIPPLE. Could Mr. Fitzpatrick go a little slower. I missed it, too.

Mr. FITZPATRICK. I will give the citation and then ask the question.

CHIEF HEARING EXAMINER. Proceed.

The WITNESS. Let me see what it says. I will read it. Yes, that is correct.

By Mr. FITZPATRICK:

Q. Now, is there any aspect of total cost involved in there? Does the manager take into consideration, for instance, that there is a certain percentage of profit that accrues to ITT, were he to buy internally?

Mr. WHIPPLE. Could that be clarified? I think that there are two questions there.

The WITNESS. I was going to answer the question "no," and if there is another one you will have to ask it. We have a policy which puts all of our buying on a completely competitive basis, just the way we have spoken of here regarding efficiency, and price, and delivery service, and quality and suitability and so on. And we follow that pretty [1980] good, and carefully, in all of our divisions, and the divisions have complete autonomy to do this.

We have a number of cases where our divisions buy from competitors products that we make in our own company, because in their mind this is what they want to do. I can cite a couple of things, if they are of any interest to you. There are semi-integrated circuits from manufacturers outside ourselves, although we make them. Our Coronett plant will not use the wire from our Rhode Island Wire Plant because they think that they can buy it cheaper elsewhere, and they are doing so. We buy chillers in our Nesbit school division, and we buy them from Chrysler, although we make them in Bell and Gossett. Bell and

Gossett makes electric motors but one of the companies that could use them will not buy them because they can get them cheaper elsewhere. We carry this through pretty carefully.

By Mr. FITZPATRICK:

Q. And you keep a good eye on this, too?

A. Again, this gets back to the question of our own self-interest. We don't think it is good business to go the other way, number one, and we have our usual regulations and they are pretty strict about not wanting anybody to deal on any other kind of a basis. But more importantly, if you give the divisions a chance to do this, they will operate on this basis, and it is good for our divisions.

[1981] The WITNESS. I am aware of what our staff does. And if they are carrying out their duty, this is what would happen.

By Mr. FITZPATRICK:

Q. Mr. Chasen has testified that he can justify a 10 percent differential?

A. Maybe he can, and I don't know why or what it is.

Q. Well, do you not conceive that within the organization you can justify a percentage differential?

A. We are back to the question of suitability, and price, and quality, and delivery and so on, and I assume if he is justifying it he is justifying it on this kind of a basis and not on the question of whether it is profitable to ITT or not.

In other words, I am assuming he is justifying it on his own problems of cost and delivery.

Q. But you don't know?

A. I don't know, I didn't even know about this.

Q. Now, sir, you testified, and I am directing your attention to page 507 and more particularly lines 19 through 24. Do you have that, sir?

A. Yes, I do.

Q. You said there:

I will come back to the details of that in a minute. At the same time, I think that it is one where it is quite evident that the element of competition [1982] which

can be brought to some kind of parity would be both helpful from the standpoint of the listener and the public interest and would be beneficial to our stockholders.

Now, sir, I ask you, this is dealing with parity between the television networks—have you found it?

A. I found it and I was trying to get the context of this.

Q. I was trying to give it to you.

Mr. WHIPPLE. Could we have a chance to read the transcript?

Mr. FITZPATRICK. Certainly.

The WITNESS. That is all right. I will take any help I can get.

By Mr. FITZPATRICK:

Q. Let me ask you a question without relating it to your testimony. Do you feel or is it your view that there should be a parity as between the three television networks?

A. My view would have definitely been that the stronger you can make ABC, and competitive parity, if this is the word, with the other two networks, the public interest will be served.

Q. Now, will you please tell me what do you mean by competitive parity? Do you mean profit-wise, or sales-wise?

A. Well, profit. Well, let us say resources. That is a matter of strength, and it is part of what you need to be [1983] a competitive network operating company today, and this is increasing.

Q. Are you talking about physical resources, such as studios, or are you talking about network affiliates?

A. Well, I am talking about all of these things.

Q. Which is the most important to your mind?

A. Well, I think that you have to proceed from one to the other. As I think some of the testimony that I gave pointed out, we are undertaking to offer financial and technical support in the interest of getting ABC a better signal, and better programming, and they have testified in detail how they would translate this, whether it is color equipment or programming or news and public affairs.

Then I added another factor, which I think is important, that with this kind of continuity assured, there is more confi-

dence that the future will be like this, and the competitive end of it will begin to develop. Then you are in the areas of saying, "Where will this take you?" and I think in the testimony I have indicated that any improvement of strength, however you do it, is bound to bring them some more hours on shared stations, we will say.

UHF is part of this thing, as we saw it, to push down these areas, but there are no easy answers to the outlet area so you do the next best thing. I could refer you to the testimony here, which I think was important, as Commissioner Cox [1984] asked the same question, and I said, "Well, this is the most viable solution that is presently available in my opinion." I was interested in his answer, and he said, "I have no better one to offer you."

Q. With all due deference to the Commissioner, you don't mind if I pursue it for a moment?

A. No, I am trying to point out that there is no easy answer, and we are going to have to work our way up to it.

Q. One of the factors is improvement in programming?

A. That is correct.

Q. Another factor is improvement in physical facilities?

A. That is right.

Q. Another factor you say is improvement in confidence?

A. That is correct.

Q. Do you feel there is any confidence lacking in the present management of ABC?

A. It is not a question of management. It is a question of resources and continuity of effort. I think Mr. Goldenson testified, I think he did testify at great length, about his problems of laying out programs and carrying them forward, when he had problems with his resources, availability of capital and his earnings on a small basis. These are all things that I think we give assurance to a possible affiliate that might change to us, or an advertiser or anybody [1985] else, where confidence in the long term answer is an important factor.

Q. Do you feel that Mr. Goldenson and ABC have not been able to compete on a program basis with the other two networks in the last two years, let us say?

A. Well, it is hard to say. My impression is that if they want to get anywhere they are going to have to out-compete the other fellows, that is the unfortunate part, and yet if I look at the national Nielson's, it is obvious that the outlets that they have are holding them back. If I look at the 30 market Nielson's, for most of the year there is a deficiency between them and the other two.

If I look at the financial figures that have been filed, the figures are very startling.

CHIEF HEARING EXAMINER. I think that your previous question ought to be answered.

The WITNESS. Did I miss one?

(The reporter read the record.)

[1986] The WITNESS. Well, I would have to say in part, and let me explain, and then you take the rest of the answer.

By Mr. FITZPATRICK:

Q. In part they have not competed?

A. I am looking at the Nielson ratings.

Q. I am talking about the subject matter of programming and you are talking about improving programming. I am asking you, is the programming of ABC presently not equal to the other two networks from a programming viewpoint in your opinion?

A. In my personal opinion, it is, but if I measure it by the only measurement I know of, Nielson Ratings, then I would say the ratings definitely show what I have just said.

Q. And you feel the Nielson Ratings are determinative?

A. They are the only generally accepted measurement of programs that I know of. If you are talking about programs that are sponsored—

Q. You feel that by increasing the Nielson Ratings of ABC, they will be able to get the door open to having more programming in some of the affiliates not available to them now?

A. By general strengthening of the program facilities and confidence, which is my comment. Now I assume we are talking here about their normal product on which they are competitive. Obviously, to the extent that they are running public affairs or

documentaries, this is not necessarily [1987] competitive areas, and this is a public service area.

Q. Now, sir, are you familiar with the 30-market Nielson Rating?

A. Generally.

Q. And that relates to 30 markets where the three networks are basically on a parity, in that they all have affiliates and coverage basically is the same?

A. That is right.

Q. Is it your understanding that ABC is in some way not an equal to the other two networks in that area?

A. If I take the last five years, I forgot which year it is, I think it was 1963 and 1964, they led the 30 market ratings, but I think in every one of the other five years they were varying degrees behind.

Q. Sometimes up and sometimes down?

A. No, I think in one case they were ahead of NBC perhaps and behind CBS, but for the most part they were behind both of them.

Q. Now, with respect to the national ratings, that reflects the outlet factor that enters into it?

A. That is right.

Q. You feel that by some improvement in programming, you will be able to attract to ABC some of these outlets?

A. By improvement in programming and you might say confidence that the level of programming will be maintained [1988] and improved, and so on, I would think it would have this effect.

Q. By that you are thinking in terms of winning over some of the V's in the two station market?

A. Either winning them over or more hours.

Q. Which will result in one of the other two networks having less hours?

A. That is correct, and maybe it is a long shot, but we are willing to go to work on the UHF. We have to.

Q. What is your policy going to be with respect to affiliations with UHF stations? Have you formulated a policy?

A. I haven't, and I would be following basically the recommendations of Mr. Goldenson and his management.

Q. Do you know what the present policy of ABC is with respect to affiliations with UHF stations in these two station markets?

A. I think that he does the best he can with what is available.

Q. You mean he tries to get as many programs on V's as he can?

A. I would think he would, and if I looked at his networks results, I don't think that I could blame him.

Q. Do you plan on changing that in anyway, by greater use of UHF?

[1989] A. If we can get UHF's, that will give him better answers and shared hours on TV, and this includes late hours. I would certainly think that our objective would be to see if we can't come up with better answers for him, for his network, and correspondingly this would obviously be in the public interest if it would make more programming available to everybody.

Q. That is if there is some improvement in UHF service?

A. That is one of the things we want to go to work on.

Q. Now, you said talking about the factors that enter into network competition, page 508, line 16 through 18, "So you might say the first two factors encompass a competitive program and a competitive signal."

A. Yes, sir.

Q. What did you mean by "a competitive signal"?

A. Well, this had to do with the facilities in the O&O stations particularly, and network origination of programs. This gets really back to this capital program for color. You might get over into the field areas of hand-held cameras, and mobile vans and things that might be required to come up with better coverages and better signals coming out.

Q. Will you explain what you mean by those terms?

A. Which ones?

(The reporter read the record.)



[1990] By Mr. FITZPATRICK:

Q. How would you use the mobile van?

A. I am thinking of having more of them available to cover more programs. These are pretty expensive items, and I know these are some of the things that they are planning to build into their physical requirements.

Q. You mean on-the-spot programs?

A. Yes, sir.

Q. That is in the programming area?

A. But you need the facilities to do it. If you only have two of these, you might have 12 locations you might want to spread them through, and if you have six of them perhaps you can cover all 12, and if you have two you can't.

Q. You are relating that to a competitive signal. That was the term I asked you about. What did you mean?

A. I was thinking of the studios and the cameras and equipment that goes with it, and lighting. I am sure you get a better signal, a better picture.

Q. That is what you mean?

A. Yes.

[1998] \* \* \* \*

By Mr. FITZPATRICK:

Q. Let me ask you this, sir, and I will ask you to tell me of your knowledge, has the ITT board of directors to date approved an expenditure of any amount of money for the future development of ABC in the event of a merger?

A. After our hearing in September—let me go back a little, if I may—first we had the exchange—

Q. Is the answer "yes"?

A. The answer is "yes."

Q. When was this done?

A. It was done in principal in an exchange of letters that we had on March 18, and March 28, which was approved by the board. I will be glad to read you the details of that.

Q. Is this March of 1966?

A. March of 1966.

Q. Didn't your letter state that you will have to go [1999] back to the board to get approval?

A. It stated that I would use my best efforts to do this. We will go on from there.

Then on July 25, and I have forgotten the respective dates, were the first hard figures that we had out of ABC and these were presented to our board in our September meeting.

Q. Now, did they vote that they would approve those commitments? Did they vote they would approve them in the event they found it necessary to be competitive?

A. No, they recognized that these were requirements that might be placed upon them. Then, after the September hearings, as you recall, we said we were committed to support whatever was necessary to be a competitive network. There was a great deal of discussion and we finally resolved down and somebody had to name a figure, so we said in our opinion, it would be a minimum of \$50 million. That figure was taken to our board in its October meeting, and enforced by them. I don't know that we have a formal motion on it, but I am sure that there was no question about the ITT board having stayed with their commitment, which was expressed in words before, and knowledge of the figures in the July letter and finally a flat understanding that they would support the \$50 million which, as I said in the hearing, was not the figure. The \$50 million is a minimum, and it is what is required.

[2000] Q. How was it enforced by the board?

A. It was our usual action. We presented it to them, the facts, and they all agreed with the position I had taken.

Q. Is this action reflected in the board minutes?

A. I don't know.

Q. It was a formal action, if it would have to be approved?

A. I don't know whether it was a formal action but I consider it a very reliable commitment.

Q. Was it a commitment to advance \$50 million in order to make ABC competitive?

A. It was a commitment to advance what they needed to be competitive.

Q. Who is to make the decision as to whether they needed it to be competitive?

A. Basically, the ABC board.

Q. Well, you say basically, was there any understanding reached by the ITT board members that it was not themselves who would make that determination?

A. Usually they don't need to approve all of our capital areas, and I think if I brought it to them they would approve it and if I told them what it was, it would be approved.

Q. I am not asking what they might do. I am asking you what they did?

[2001] A. We didn't have a formal motion on it.

Q. There has been no formal action of the board?

A. No.

Q. And no formal commitment by the ITT board?

A. No. I would guess, if there was a consent and common understanding, if that is a commitment we have it, and if there is a question of formal resolution, I don't think that we have it.

Q. Now, was your understanding on the basis of all of the information? I am asking you now individually, what is your understanding on the basis of all of the information furnished to you by ABC, as to what amount it will be necessary for ITT to advance to ABC within the period 1966 through 1970, to be competitive? And by advances, I mean in addition to the money that they are going to generate themselves.

A. Well, this cash flow shows a peak requirement of \$85 million in 1966. This does not allow for any running cash balances that they would need. If these turned out to be the exact requirements, then that would be the figure that we would support. As I said this morning, in a company our size, over a period of four or five years supporting this much in a subsidiary the size of ABC, is not an unusual requirement at all.

Q. Well, was this cash flow estimate brought to the attention of the ITT board of directors?

[2002] A. No, I don't believe it has.

Q. So you are speaking as the chief executive officer when you say "we", is that correct?

A. That is correct. I would say that they are aware of the immediate requirements, because they had to approve the \$25 million loan.

Q. Well, in approving the \$25 million loan, that was a formal action of the board?

A. Yes, but it was a very unusual situation here. ABC is not part of ITT. As such, normally, we would not be loaning money to ABC, because there would be no purpose, or no business purpose.

Q. You are not in the business of loaning money?

A. Not in this area. But if this were a part of ABC, as we have already said in that loan agreement, this would immediately be converted to an advance, and this is the route we would go for what they need. I can assure you, and I can only give you my assurance, that the board has no problem with what we are talking about. Now, I know what our advance financial planning is, and I know that in there we have already figured additional sums for ABC and the board is aware of this, assuming of course the merger goes through.

Mr. GORDON. I thought the question dealt with what the ITT board had approved, and I don't know if it is at all [2003] responsive to talk about what the ITT board is aware of.

CHIEF HEARING EXAMINER. I am inclined to agree with you, Mr. Gordon, that these answers get very far afield.

Mr. FITZPATRICK. I agree they do, Mr. Examiner, and I would move to strike except I don't want to be in a position of depriving the Commission of any information, and I wouldn't want to be accused of that. But I do wish the witness——

Mr. GORDON. I think his answer is not responsive.

Mr. WHIPPLE. May I be heard, please?

I think I have a right to be heard, if I may, when Mr. Gordon and Mr. Fitzpatrick are through. I thought we were trying to make a full record here. Many of these questions were asked and are not susceptible to a "yes" or "no" answer. It seems to me that many of the things that have been said here, including this last answer, are in the interest of having a full record. If I may respectfully submit, these are not simple matters like an accident case on the corner. "Did you see the car?" and "How fast was it going?"

These matters involve business affairs of large consequence. I respectfully submit, sir, that an answer like Mr. Geneen gave is in the interest of a full record.

Mr. GORDON. I am sure that you can develop that.

CHIEF HEARING EXAMINER. Well, Mr. Whipple, if all witnesses could develop what they thought was advantageous to their cause, we would have endless records here. I am going to have to [2004] sustain the objection. I want you to feel free, on redirect, to develop whatever you think is appropriate. But we must stay within bounds of the question if we are ever going to finish this proceeding. That will be the ruling.

I will strike that portion of the answer which is not responsive.

By Mr. FITZPATRICK:

Q. Now, sir, then what has the board of directors of ITT approved to date other than the \$25 million loan?

A. If you are talking about formal action——

Q. Yes, sir.

A. That is the only formal action I know of where a resolution was passed, other than to endorse the letters which we exchanged in March.

[2018] \* \* \* \* \*

By Mr. WHIPPLE:

Q. Now, this proxy statement is dated February 14, is that correct?

Excuse me, the contract is dated February 14, 1966, is that correct?

A. That is correct.

Q. And this was approved by the Board of Directors of ITT?

A. Yes.

Q. That is the contract itself was approved by the Board of Directors, I am sorry.

A. Yes, sir.

Q. Now, the proxy statement itself is dated March 25, 1966, is that correct, the first page?

A. That is correct.

Q. Do you recall that this proxy statement was submitted to a meeting of the ITT Board of Directors on March 9, 1966?

[2019] A. Yes, it was.

Q. And this formal proxy statement was approved, looking to the meeting of the ITT shareholders to be held on April 27,

and I believe you testified to a letter of Mr. Goldenson's dated March 18, with Attachment "H". Do you recall that this afternoon?

A. Yes.

\* \* \* \* \*

By Mr. WHIPPLE:

Q. Can you tell us what happened at the April 13, 1966 [2020] meeting with respect to the applications which would be part of the filing with FCC, including the exchange of letters of March 18 and 25 and Attachment "H". Do you recall?

A. Yes, I recall part of it. They were approved by the Board, including the fact that the letters themselves exchanged with Mr. Goldenson would be made a part of the application. The proxy was approved, and I don't remember what other legal problems we had at the time.

Q. Now, there was a meeting of the Board of Directors of ITT on September 14, 1966, was there not?

A. September 14, 1966.

Q. Did you report on the status of the proposed merger at that meeting?

A. Yes, I did. I reported on the exchange of letters on July 20 and July 25, including all of the implications that were involved in them, and the fact that we had sent our letters with the details down to the Commission.

Q. What did the Board do?

A. The Board endorsed in principle, considered and endorsed in principle the commitments which were spelled out in there, as being part of our original understanding in our March exchange of letters.

Q. Do you recall that the hearings before the Federal Communications Commission which have been adverted to today took place on September 19 and 20, 1966?

[2021] A. Yes, I do.

Q. And was there a Board of Directors meeting of ITT held thereafter, namely on October 12, 1966?

A. That is correct.

Q. And at that meeting did you review the status of the merger?

A. We reviewed the status of the merger, and we reviewed the testimony, and we reviewed the general commitments that had been made in the hearing, and including specifically the \$50 million which we had said we would put up as a minimum to support ABC's position, and becoming a competitive network.

Q. Did the Board approve——

Mr. GORDON. I object. I don't know what he is asking about as to what they approved. He has testified earlier that the Board has never approved anything.

Mr. WHIPPLE. I will reframe the question.

CHIEF HEARING EXAMINER. Let me state it.

What action, if any, did the Board take, sir?

The WITNESS. The Board took what we generally considered Board action, which is an endorsement in principle, a reflection of the minutes, and basically I gather from our counsel, that this is a legally binding commitment on the Board.

Mr. WHIPPLE. Very well.

Mr. GORDON. May I move to strike the last part of the answer?

[2022] CHIEF HEARING EXAMINER. It is stricken.

Mr. WHIPPLE. What is stricken, please.

CHIEF HEARING EXAMINER. The last portion.

Mr. WHIPPLE. May I find out——

CHIEF HEARING EXAMINER. Where he expresses or quotes a legal opinion.

Mr. J. McKENNA. I would think that the Commission would want to know if ITT's counsel have advised them that in their opinion what occurred at that Board meeting was binding upon the company.

Mr. WHIPPLE. What possible objection could there be?

CHIEF HEARING EXAMINER. The ruling will have to stand. We can't dispute the ruling. You have your objections and exceptions later.

Mr. WHIPPLE. I respectfully submit, I am entitled to get this in the record subject to a motion to strike. If I argue before the Commission, and the Commission says it ought to be in the record——



CHIEF HEARING EXAMINER. If you want what would the witness testify to, you may take an offer of proof.

Mr. FITZPATRICK. It is in the record and it is stricken so it will go forward to the Commission.

CHIEF HEARING EXAMINER. The answer is not.

Mr. WHIPPLE. Technically——

CHIEF HEARING EXAMINER. It has been stricken physically.

[2023] What is the offer of proof?

Mr. WHIPPLE. I will offer to prove that Mr. Geneen was advised by his legal counsel, in accordance with the normal procedures which obtain in the practices with respect to Board approval, that this particular action at the meeting of October 12, 1966, constituted approval by the Board and represented a legally binding commitment on behalf of the Board.

CHIEF HEARING EXAMINER. The record is complete now.

Mr. FITZPATRICK. Could we have the date of that legal opinion?

Mr. WHIPPLE. It is dated October 12, 1966, following the hearing of——

Mr. GORDON. That is the date of the meeting. I thought Mr. Fitzpatrick asked for the date of the legal opinion.

CHIEF HEARING EXAMINER. They are both the same date. They are both October 12?

Mr. WHIPPLE. I don't know whether a legal opinion was delivered on that day.

Mr. GORDON. That is what Mr. Fitzpatrick had inquired about.

Mr. J. McKENNA. Perhaps a solution, Mr. Examiner, would be to have a letter opinion from counsel appear as an exhibit in this record.

CHIEF HEARING EXAMINER. I think that would be highly [2024] desirable and make it a part of the record.

Mr. GORDON. I think we ought to have a copy of the minutes, if you please.

Mr. FITZPATRICK. I think the minutes of this meeting should be entered.

CHIEF HEARING EXAMINER. I think the legal opinion should be in writing, if you could make an exhibit of that, and likewise

a copy of the minutes. We will have exhibit numbers assigned to them now so we won't forget it.

[2026]

Q. By your answer, I am afraid you might have misunderstood my question. You said you were talking about the definition of networking. I asked you whether networking would mean going into competition against ABC, NBC, and CBS networks?

A. The answer would be "yes," in my opinion.

Q. Then I ask you whether you ever had any intention [2027] or plans of ITT doing that on its own as distinct from acquiring an existing network?

A. I said, "no," and I testified to that in the September hearing.

Q. Will you turn to Exhibit J-74, Mr. Geneen.

Do you have that before you?

A. Yes, I do.

Q. I ask you to turn past the first two pages, to the attached memorandum dated November 1, 1965. Do you see that?

[2028] A. Yes, I do.

Q. I direct your attention to the fourth paragraph stating the industry is very new and many new problems develop from day to day.

By the way, you wrote this memorandum, did you not?

A. Yes, I did.

Q. I direct your attention to page 2, the paragraph ending about a quarter of the way down the page. You see the sentence, "We need to identify and review the risk factors in relation to the size of each investment."

A. Which paragraph is that?

Q. Ending about 10 lines from the top of the page.

A. I see it.

Q. And the next paragraph, you see the reference in terms of security for franchises, to clauses which might be enforced as to cancellation?

A. Yes.

Q. And next paragraph, do you see the reference, "In another area list the whole question of determining the stability of these franchises."?

Mr. FITZPATRICK. Unless we are laying a predicate for a specific question, I will object to reading portions of this.

Mr. WHIPPLE. May I proceed in my own way?

CHIEF HEARING EXAMINER. You are laying a predicate for [2029] a question?

Mr. WHIPPLE. Yes, I am.

By Mr. WHIPPLE:

Q. Will you proceed to the next page, the last paragraph?

Do you see the paragraph saying "This brief memo is intended to indicate where there are large potentials there are also possibly risks."

A. That is right.

Q. In the industry?

A. In the industry, yes.

Q. Now I ask you whether you are not familiar with the fact that in some of these other exhibits that Mr. Gordon showed you this morning, there are also references to high risks and various and sundry problems which are articulated.

Mr. GORDON. I object to the form of the question.

CHIEF HEARING EXAMINER. It is an improper question and it is a leading question all of the way through, Mr. Whipple. I have to sustain the objection, so far, to the form of the question.

Mr. WHIPPLE. Mr. Geneen, in these various memoranda, or at the time you wrote these memorandum or considered them, that Mr. Gordon showed you this morning, were you aware of other considerations apart from those to which he directed your attention in the CATV industry?

[2030] Mr. GORDON. I object to the form of the question. He doesn't define what memorandum he is referring to, and he doesn't define what problems he is referring to, and he leaves the record in a state of utter confusion.

CHIEF HEARING EXAMINER. I overrule the objection. I think the witness understands, and the record is clear.

Proceed, sir.

The WITNESS. I do.

I think what was read into the record was selected paragraphs in the memos, selected for their own purpose.

By Mr. WHIPPLE:

Q. What other factors if any did you have in mind apart from those to which Mr. Gordon directed your attention when you were considering the advisability of ITT going forward in the CATV industry?

A. You mean by continuing going forward or beginning?

Q. Yes, and evaluating the pros and cons of their going forward.

A. Well, we had in mind all of the risks that were identified in the material that we set up for the meeting on November 1. You have read some of these. In addition to that, earlier than that, we had problems that were beginning to come to light and whether we were investigating properly the franchises we were getting into, whether the credit checks being made were adequate, and whether we had indeed figured [2031] out whether we had proper signals and things that would insure success. In general I had the impression that the whole undertaking was moving in a manner that was largely uncontrolled, and I think there are areas here that are marked on my memos, which are related specifically to these kinds of facts.

By Mr. WHIPPLE:

Q. And you had those lists of problems involved in calling the meeting of November 2, 1965?

Mr. GORDON. Objected to as leading?

CHIEF HEARING EXAMINER. Sustained.

By Mr. WHIPPLE:

Q. Is it or is it not a fact that you had these considerations to which you have just testified in mind when you called the meeting of November 2, 1965?

Mr. GORDON. Same objection.

CHIEF HEARING EXAMINER. Same ruling. The answer will have to be stricken.

Will you proceed.

By Mr. WHIPPLE:

Q. What were your reasons for having the meeting of November 2, 1965?

A. I was very worried about the investment and my concern was to find out whether some of the things I had been hearing and seeing were true, and if so my conclusions were, [2032] after the meeting, that we would not go forward any further.

Mr. GORDON. I object to what his conclusions are.

He was asked the reasons for the meeting.

CHIEF HEARING EXAMINER. We will let it stay.

The WITNESS. My reason was that I could find no justification for what we were doing in the sense of proper handling of it, and what the probable answers would be in the sense that we had not properly checked out the investments we had made.

I concluded by freezing everything we had at that time, and I had already put Mr. Volbrecht in charge and his job was to find out whether we should do anything further, but until they could prove that we should, it was stopped.

Mr. WHIPPLE. There are references in the documents to pay TV, and Mr. Gordon showed you those. Do you recall those?

The WITNESS. I don't recall. I guess something came up about it this morning.

By Mr. WHIPPLE:

Q. I ask you whether ITT ever had any intention or plans of going into pay TV.

A. Not to my knowledge. Somebody else might have.

Q. Your attention was also directed—will you look at J-119?

A. Yes.

Q. I think we can short circuit this. Do you recall [2033] some references in documents which Mr. Gordon directed your attention to this morning, to the possibility of a microwave connection of CATV systems?

A. The question came up, and I don't remember the document.

Q. Do you recall the reference to it?

He asked you whether ITT ever had any intention or plans of going into that area.

A. I don't recall any. We had a speculative interest in looking into it.

Q. Was there anything more than speculative interest?

A. It never became anything more.

\* \* \* \*

[2041] By Mr. WHIPPLE:

Q. What were your responsibilities for voting in favor of the ABC transaction in general, without reference to the specifics which appear in J238? I believe you said you counted some 40 of them this morning.

A. We brought some of them in on the record but in general, we felt that this was an area that offered substantial and profitable growth of the company, and one to which we could contribute to technically and financial resources, and achieve an increase in the rate of earnings, and in turn, a very profitable and sound operation.

\* \* \* \*

[2042] Mr. KESTENBAUM. I object, and I understand it was based on yesterday's testimony.

\* \* \* \*

Q. There has been testimony earlier today, Mr. Geneen, with respect to increased expenditures which ABC would incur with respect to color and studio complexes among other things. Does this change your view as to the attractiveness of the ABC transaction to ITT?

A. No, it does not.

Q. Why not? Any user reasons?

A. The basic earnings and returns that we think are there, and the attractiveness of the area have not changed. The investment which will be made largely because of technological change which has come upon the industry very rapidly in our [2043] opinion, is well warranted, because it will in turn pay out over a period of time plus bringing additional programs to the public interest area.

I think it is pretty clear that if you are going to have a competitive network, we are going to have to make investments that are necessary to stay with our competition.

In the size of a company like ITT, the amounts that are required here, and additional amounts as I testified this morning are in reasonable relation to what we have found necessary to invest in other companies that we have gone into.

In turn, the original objectives which we went into are here, and the fact that we have to put more investment momentarily for a period of years, I think is a transitory problem, and our returns and our future, I think, is exactly the same reasons we went into the program in the beginning.

[2044]

Q. What is ITT's policy with respect to making companies it acquires fully competitive?

A. Our policy is to make them competitive and to do what is necessary including the investment to make them competitive. I think I testified this morning that in this particular case, it was part of the original agreement on which we started the whole proposal of the merger.

Mr. GORDON. I move to strike the last part of the answer as not responsive.

CHIEF HEARING EXAMINER. It is stricken. It is not responsive to your question.

By Mr. WHIPPLE:

Q. Will that policy be followed in this instance?

A. It certainly will.

[2045] Q. As chief executive officer of the company, ITT, are you satisfied that ITT is capable of financing the capital expenditures, ABC's capital expenditures with respect to colorization, studio complexes and the like which are anticipated over the next five years and beyond that time?

A. I am.

Q. You have no reservations about that?

A. No.

[2047]

The WITNESS. The answer is "yes", but I would assume we would have some purpose for it. This morning the assumptions



were all made within the framework that the FCC in some manner was going to allow this to happen.

I would think that it was clear that the FCC was not going to allow it to happen, that is direct broadcasting from satellites to homes. I am not sure whether our reason for doing it would be, unless perhaps it was to support something in the international field. On the other hand, if they were going to allow it, which is what the assumption was this morning, or if we were anticipating that they were going to allow it, we would certainly do so, because I don't think that there is any protection for ABC, if there is technological changes coming, in holding back or hanging back.

I think we want to be in the forefront, and if there are any changes this is the only way to protect the company, including the network, by doing that.

\* \* \* \*

[2060] By Mr. WHIPPLE:

Q. May I ask, Mr. Geneen, did you understand the questions Mr. Gordon asked you during his re-cross with respect to the types of activities in research and development work that ITT would not undertake in UHF were it not for the ABC merger?

A. Well, I think that he asked me whether we would undertake these systems work if it were not for the ABC merger. I said that we had not made a study of the profitability of that, as such, as a business, if you will, and that we would have to make such a study in order to make such decision, but my off-hand, and I guess I have to characterize it as off-hand, reaction is that it might not be a desirable field for us.

\* \* \* \*

[2079] TESTIMONY OF JULIUS BARNATHAN

By Mr. HUNTER:

I would like to explore with you for a few minutes, Mr. Barnathan, the present ABC programming schedule and the [2080] facilities with which those programs are produced at the present time. I hand you a copy of AR-50 which is entitled production facilities used for regularly scheduled ABC programs, January 1967.

Mr. COHN. Is that AR-50?

Mr. HUNTER. Yes.

By Mr. HUNTER:

Q. The first program I note on that list which is produced in ABC facilities is "Combat," a one-hour program which indicates that it is produced in Selmur, Hollywood. What is Selmur, may I ask?

A. Selmur is a wholly owned subsidiary of ABC that produces programs. It is not produced in an ABC facility.

Q. It is not produced in an ABC facility?

A. No, sir.

Q. Then this document is incorrect?

A. Yes, that is incorrect. The show itself, physically, the basic elements of shooting are done in a movie lot. This is a film program. I believe it was shot at MGM. I don't know what movie lot it is shot at now but this is a film program that is shot of our basic facilities.

Q. Who owns the movie lot?

A. I don't really know. It was MGM. I don't know which lot they are on now, Desilu or one of the other lots.

Q. The next one is ABC Stage 67 which was, I take it, a [2081] one-hour weekly program and is no longer going to be, is that correct?

A. I don't know. I believe—it is not in a single time period for next year as I understand it. It is being scattered throughout the schedule.

Q. Where was that show produced during this past year?

A. It was produced at CBS, NBC, London, filmed most everywhere.

Q. Was it produced in ABC facilities?

A. Some of it was.

Q. Some of it was?

A. Yes.

Q. How much? How many of the weekly programs in this past television season?

A. May I point out something? Every one of these shows ABC does some production work on them, every single one of these, including the ones that are listed as outside facilities.

I would like to say that the definition of where the basic shooting is is one factor. After the program is shot there is much post production that goes into the final product.

ABC is involved in many cases in the post-production work. For example, many of the ABC Stage 67's were transferred to tape, integrated completely on tape at our facilities.

Dubs were made, the final duplication of the films, the multiple insertion of commercials, all were done at ABC [2082] facilities. I believe that most of the Stage 67 basic shooting was not done at ABC.

[2089]

Q. Turning to the next evening's program schedule, I will run down the new shows that you have in prime time. Cowboy in Africa, where is that produced? Is that an ABC production?

A. No, sir. It is not. It is produced at—I am not positive as to who the producer is.

Q. But it is not produced in an ABC facility?

A. Again, we have quite a bit of post-production that must be done at an ABC facility.

Q. It is not shot in an ABC facility?

A. That is correct.

Q. Garison's Gorillas?

A. That is not shot in ABC facilities.

[2090] Q. NYDP, which I take it is New York Police Department?

A. That is not shot at ABC facilities.

Q. The legend of Custer?

A. That is not shot at ABC facilities.

Q. Second Hundred Years?

A. That is not shot at ABC facilities.

Q. The Flying Nun?

A. That is not shot at ABC facilities.

Q. Inside Out?

A. That is a remote program.

Q. What do you mean by remote?

A. This is a program that will be visiting a dignitary or celebrity's home. It will be live on tape.

Q. You will be using video tape recorders?

A. We might. This is in negotiation right now. It has not been determined.

Q. But the interview will be in a home rather than in an ABC studio?

A. That is correct.

Q. Off to see the Wizard?

A. Not in ABC facilities.

Q. Hondo?

A. No, not shot at ABC facilities.

Q. Guns of Will Sooner?

A. No, not shot at ABC facilities.

[2091] Q. Jud?

A. Not shot at ABC facilities.

Q. And the Joey Bishop Show, I believe is going to be a late-night show?

A. Yes, that will be ABC facilities, 1313 Vine Street, in Hollywood.

[2142]

Q. But you have plans for refurbishing the Colonial?

A. Only if I have to do it to meet a programming requirement.

[2154]

Q. Now, do you have detail drawings of this new production studio?

A. Detailed drawings? No, sir.

Q. You just have the estimate?

A. We have a rendition of what we would like to have.

Q. How did you base this figure of \$32 million for construction of that studio?

A. It is based on the, it came from our construction department in consultation with the Diesel Construction Company. [2155] We estimated the studio and the production services center, which is below ground, 32 feet below ground, at an estimate of \$7 a cubic foot and the stories above that, which would be primarily office space, at \$3 a cubic foot. The building would go 32 feet below ground and I believe about 195 feet above ground.

Q. Didn't you submit document AR-31, a graphic representation of this new studio complex?

A. Yes. That was the broadcast operations and engineering portion, yes.

Q. Now you are planning something different than you planned——

A. No, sir, we do not plan anything different.

Q. On February 13, 1967?

A. Let me, before I respond, get the full intent of the question.

Q. I would certainly like to get the facts in. You have a drawing, do you not, of the production services complex?

A. That is correct.

Q. I believe it shows it is a total height of about 97 feet?

A. That is correct.

Q. What are the other dimensions that are not represented on here?

[2156] A. This is 300. This is 100.

Q. By this you mean it is 300 feet in length and 100 feet in width?

A. Right.

Q. And about 100 feet high or 97; isn't that right? This is your building, Mr. Barnathan?

A. This is not an engineering drawing. I cannot say it will be 97 feet high because I have not provided for airconditioning or facilities. I have to have space between the walls.

Q. But in the document submitted to us by the applicant as a representation of this building it is 97 feet high?

A. Yes.

Q. Have you changed it since then?

Mr. BERGSON. Just a minute, Mr. Hunter. This was not submitted as a representation of the form of the building. This was submitted to show what the document itself speaks to and that is all.

CHIEF HEARING EXAMINER. Let us proceed.

Mr. HUNTER. Mr. Commissioner, if I might object to Mr. Bergson's statement. The chart says proposed New York production services in studio complex. Underneath is a graphic

representation with dimensions on it, the height dimension being 97 feet. All I want to know is whether this is again no longer their plans, whether they have changed that [2157] also?

CHIEF HEARING EXAMINER. Sir, is there any change in that plan to your knowledge? If there is tell us.

The WITNESS. For the broadcast operations portion, no.

By Mr. HUNTER:

Q. In this building is there any change?

A. That is not the building. That is the production services complex.

CHIEF HEARING EXAMINER. I am afraid you are arguing with counsel. We cannot have that. Now there is a document here. It will be shown to you. You will be interrogated about it and you must answer directly.

The WITNESS. I am sorry, sir.

By Mr. HUNTER:

Q. So this is not the whole building?

A. That is not the whole building.

Q. It was not indicated on the document when it was submitted?

A. This is a presentation chart which I talked and explained together with that chart.

Q. What are the dimensions of the building now? Have you finally decided on them now at this stage?

A. They were decided at that time. They were in the estimate.

Q. But they were not reflected on this document which [2158] you submitted to us?

A. That is right.

Q. But now you have it?

A. That is correct.

Q. What are the dimensions now?

A. We are going to use every inch of height that we can on the site.

Q. I understand that. I am asking for the dimensions.

A. I believe it goes up 100—I would have to look at my, I would have to get back on that particular question. I can tell

you it is roughly 108 feet above this particular height of the building at this point. That is when we have to go setback. The building would be 95 and 108, I believe it is about 203 high.

Q. 203 feet high?

A. Right.

Q. How many stories is that?

A. It is 10 above this.

Q. By that you mean?

A. Ten above the production services area.

Q. So you are going above the production services area which contains the needed studios, I take it?

A. That is correct.

Q. Ten stories beyond that, above that?

A. That is correct.

[2159] Q. What is going to be in that?

A. That will be office space. Rehearsal, production, various other requirements for the various people who are not on the site now. This is office space for the producers, producing people, people who have to work on the site. Dressing rooms. Various production units.

Q. When did you make the final design of this building? This building which I have here represented on Chart 11 seems to be now you say only a portion of what you are actually going to build on that lot?

A. That is broadcast operations and engineering portion, that is correct.

Q. Actually all this time that we didn't know there were ten stories above that?

Mr. BERGSON. You didn't know. I object, Your Honor. He is putting words in the witness's mouth

Mr. KESTENBAUM. The word was "we."

CHIEF HEARING EXAMINER. I will overrule the objection. Let him answer.

By Mr. HUNTER:

Q. All this time I say there were ten stories above this graphic representation that we didn't know about?



A. That is correct, that you didn't know about.

Q. You knew about it?

A. You didn't know about it; we knew about it.

[2160] Q. Your counsel knew about it?

Mr. FITZPATRICK. Broadcast Bureau didn't know about it.

[2167] \* \* \* \* \*

Q. Again, do you have AR-25 and the attachment to AR-3 in front of you?

AR-3, again, was prepared on February 8, 1967 and the other document was prepared on November 4th, 1966. I wonder again if we can look at some of these items and see what happened to them in that intervening three months. The first item is construction of the new technical building. That increased, did it not, from \$5 million to \$5,890,000 in that three-month period?

A. Yes.

Q. What was the basis for that estimate increase?

A. The basis is that the estimate for \$5 million was a ball park estimate, the \$5.8 million was in consultation with the construction company.

Excuse me, I am sorry. One was 10 stories and the other was 12 stories.

Q. The first estimate was on ten stories?

A. Yes, and the other was on 12 stories.

Q. You decided to put up two more stories?

A. We decided as a legal policy to go to the legal height that we could so as to use less of the land.

Q. That resulted in the increase of \$890,000?

A. Yes.

[2181] \* \* \* \* \*

Q. The next item is colorization of the Colonial Theater, which is TV 17. On November 4, 1966 you estimated that at \$650,000 and on February 8 in AR-3 that figure rose to \$3,018,000.

A. AR-25 indicates interim color, the Colonial. These were the buying of cameras so that we could do the space shot which was scheduled to be done, the Apollo Program, which was scheduled for February which was cancelled.

The figure that you have for the Colonial in the AR-3, Attachment "B" is for a full colorization of a theater for color.

Q. Now you had planned on interim colorization in 1966?

A. That is 1968, if you will notice in this.

Q. \$2 million of the expenditures is for 1967, is that correct?

A. It is planned in the fourth quarter of 1967. By that time we should have an idea if program-wise we will need this for the following season.

[2182] Q. You don't know that?

A. No, sir.

Q. So you might not need to colorize it then?

A. No. The idea is that the Colonial is a symbolic theater. We should have a theater in the entertainment district that is colorized for comedy, variety, audience type, large audience type productions.

The Colonial, \$3 million, whether it be the Colonial or another theater would be what we are talking about.

Q. At any rate, so far as your present plans are concerned you saw fit to change that from interim color to full color in 1967?

A. That is correct.

Q. You mentioned that this is something symbolic?

A. Yes. It is one of the programming requirements that the other networks have that we don't have in New York.

Q. You mean you have the theater there now don't you?

A. It is black and white and it is horrendous. It is terrible. It is old, it is archaic. It is an absolute pigpen.

Q. But this amount of money then would be for reconstructing this theater?

A. We don't own it. The Colonial we don't own. We only have a five-year lease on it.

Q. But your lease has run out before and you have been able to renew it without any problem?

[2183] A. Yes, but we believe there are better locations than the Colonial for live theater. We would rather be in the district, in the Broadway district.

Q. By symbolic you mean that you don't actually have a present program need for that but the other networks have it and it would be nice if you had it?

A. By symbolic, we have been for some time through third parties been exploring what theaters might be available that we might acquire for ABC, which theater can we acquire for ABC which can be converted to a color variety production television studio.

Q. But you don't have present programming needs for that?

A. We know that live variety programs——

Q. Do you have a present program need for it?

A. At this very moment?

Q. Right.

A. No, sir. Can I retract that for a moment. I don't have a regular program. We do not have any regular program of that nature but we do have specials that if we had such a studio in New York we would be able to do them in.

[2208] By Mr. FITZPATRICK:

Q. This document that has just been received as AR-55, on the second page shows that in 1965 ABC spent \$8,379,577 on colorizing. Now had the majority of that——

A. I am sorry, would you help me with that?

Q. Yes, on the second page. It shows you how much had been spent back in 1965.

A. Yes.

Q. \$8,379,000?

A. Yes.

Q. Was the bulk of that spent by November 1?

A. It was committed by that time. It was not spent, it was committed. I can almost tell you what the \$8 million was for.

Q. Why don't you?

A. \$4 million of it was for mobile units. \$1.6 million for the Hollywood Palace. About \$2 million for the studio E.

Q. Where was studio E?

A. Studio E was in Hollywood.

Q. Did that result in your having two studios by the end of 1965 that were colorized?

A. Studio E would be finished for the 1966 season.

Q. By the time you had undertaken this expenditure of approximately \$9 million, did you have a pretty good idea as to how much it was going to cost to buy the camera, the color equipment and to renovate and update the present existing [2209] studios?

A. Yes.

Q. When were you in a position to come up with a reasonable estimate on that cost?

A. I would say that by the—I had had the knowledge of what it was going to cost in terms of a ball park figure as to how much it was going to cost, I used the figure it would cost us over \$100 million to colorize and expand our facilities.

Q. I was eliminating, if you were careful to note, expansion. I am asking you to limit your consideration to colorizing the present facilities that you had for both as to equipment and as to studios.

Now, did there reach a time in 1965 when you had a ball park idea of how much it was going to cost? Use your own expression.

A. If we have to colorize all our facilities I would say that it was going to be at least around \$50 million.

Q. Was that including the O&C stations?

A. Yes.

Q. I was limiting it to the TV network.

A. I don't have—I know it was a huge amount of money.

[2210] Mr. KESTENBAUM. I don't want to interrupt but I believe the question was not as to the witness' present understanding but as to his understanding in 1965.

By Mr. FITZPATRICK:

Q. That is absolutely correct. I am trying to determine as of November 1, let us say, 1965, by that time you had spent at least five or six million dollars, hadn't you?

A. Yes.

Q. What was your idea as to how much it was going to cost to colorize the network and to renovate the then existing studios for color operation?

A. Over \$50 million.

[2227]

Q. Do you know how many specials there will be next year?

A. No, I do not.

Q. It won't be as many as on a weekly basis?

A. I do not know.

Q. You have no idea?

A. No, sir.

[2228] Q. Who would know? Would Mr. Siegel know?

A. I don't know.

Q. Now, with respect to the post-production work that you made reference to in your testimony this morning, does that require a studio?

A. When I say studio, it may require studio control room.

Q. But not a studio exactly?

A. Well, the studio floor, no.

Q. What facilities in Hollywood are already now colorized?

A. Right at this moment?

Q. At this moment.

A. Hollywood Palace, 1313 Vine, studio E and studio K.

Q. Is work proceeding on the others?

A. Work is proceeding on studio D and studio A.

Q. When is it anticipated that the work will be completed on studio D and A?

A. Studio D on August of this year and studio A by January 1967—

Mr. J. McKenna. '68?

The Witness. '68, excuse me.

By Mr. Fitzpatrick:

Q. Now, let us address ourselves to the colorization program in New York. What studios have to date been colorized in New York?

[2229] A. TV 11.

Q. Is that the only one?

A. TV 1 has some cameras in it.

Q. You have color cameras in TV 1?

A. Yes.

Q. But TV 11 has been colorized?

A. Yes, sir.

Q. What are your present plans as to colorizing what specific studios in New York?

A. TV A will be finished, which is for the local station——

Q. I am asking about the network.

A. It is the same as I gave you on the Coast. Studio K is the local station.

Q. Does the network use the local studios?

A. No, but the locals use the network studios.

Q. The locals use the network studios?

A. Yes. TV 1 has been occupied by locals since last October.

Q. Do you know how the accounting is done?

A. The accounting is done by the cost control department. I have nothing to do with the accounting.

Q. But the local station——

A. ——has been using TV 1 in New York.

Q. I did not mean to interrupt you. TV A, you were [2230] saying, would be completed when?

A. In July.

Q. This year?

A. Yes, sir.

Q. What else?

A. TV 16 will be colorized in July and August. TV 15 by March of 1968. TV 2, hopefully by March 1968. TV 1 by the middle of 1969.

Q. Have you started on TV 2 and 5?

A. We have not started on TV 2——

Q. 15, excuse me.

A. TV 15, yes, we have approval to go forward on TV 15 and TV 16. We are now in the planning stages.

Q. No actual work has started?

A. Physical work, no.

Q. The last one you gave me I didn't get a note on.

A. The last studio?

Q. Yes, sir.

A. TV 2.

Q. Do you expect it to be finished in March?

A. It started sometime after July and finished by March of 1968.

Q. But you have no plans presently to colorize the Colonial Theater?

A. Only if program requirements are there.

[2238]

Q. Let me ask you this.

What proportion of your programming for 18 months in advance of today will be on film?

A. I cannot say.

Q. What is it presently?

[2239] A. The major part of the nighttime schedule is on film. I believe it is about 6/7ths is on film. I know all Saturday night is on live tape. During the week—well, next year it is a flop—

Q. Is the great majority of your programming on film?

A. In the evening, yes.

Q. How about in the daytime?

A. Daytime, most of it is on tape. News is all live on tape and sports is mostly live on tape. Some of it is on film.

Q. Most of your sports don't require studios, is that correct? That is on remote?

A. They require studio facilities, though, sir.

Q. I mean control studios.

A. They need control studios. They need support in terms of film, tape and telecommunications and considerable complex requirements.

Q. Now, sir, for the next 18 months besides the Lawrence Welk and the Joey Bishop show, what other shows are you going to have that require studio space. Let me ask you in that connection, is the Hollywood Palace planned for next year?

A. Yes, sir.

Q. I will include Hollywood Palace.

A. So is Dating Game and so is Newly Weds at night.

[2241]

Q. Have you already planned out as part of your duties where these shows will be produced next year?

A. These are mostly done by outside producers and we have not at this time been approached on any to my knowledge.



They would not approach us first. They will normally go to our cost control people who will determine if the facilities are available for them.

Q. The outside producers make their own arrangements as to where they produce the program?

A. They also come to the program department and then turn to our cost control people who coordinate with us to see if the facilities are available.

Q. In those cases where the facilities are available, do you just rent them to the producers?

A. There is a rate card.

Q. In effect you rent them?

A. Yes.

Q. If those producers use ABC facilities they can go elsewhere?

A. On certain outside producers.

Q. Isn't that what most of them do?

A. We have a union and we have an agreement that those [2242] with underlying rights must be produced at an ABC facility.

Q. You have a contract which what?

A. That ABC owns underlying rights must be produced at ABC facilities.

Q. What do you mean by underlying rights?

A. For example, supposing we were to come up with an idea for a program and would ask a producer—Hollywood Palace is a case in point. That was ABC's idea and we asked Mr. Vanoff and Mr. Harbach to produce it for us.

Q. You mean this gives you the residuals on the syndication?

A. There are no residuals on syndication of this type.

Q. What do you have other than Hollywood Palace planned for next year's season which involves the underlying rights which might give rise to using ABC facilities?

A. All our news and sports and any documentaries.

Q. Let us talk in the area of entertainment.

A. I am not fully familiar with all the programs that we have underlying rights or not.

Q. You don't have that familiarity?

A. No, sir, not at this point.

[2244]

Q. Isn't it a matter of practice that the producers [2245] carry out these productions anywhere they can find that is most convenient and most economical for their own purposes?

A. If there are places available.

Q. That is the criteria they apply. They are the ones who have to meet the budget, isn't it?

A. Yes.

Q. Not ABC?

A. It is our programs. If they can't meet the budget—

Q. That is not your program, is it?

A. It is going to go on our air.

Q. It does not make it your program does it, Mr. Barnathan?

A. I didn't mean it in that way—sorry.

Q. You have no present plans to colorize the Ritz Theater?

A. Future-wise if necessary.

Q. Future-wise if necessary?

A. Yes.

Q. What does that mean?

A. It means if the programming requirements—if we have more audience participation shows, more interview shows or more requirements in New York we will colorize it but we cannot do it in the facilities we have.

Q. Does the '68-'69 schedule require you to colorize the Ritz Theatre?

[2246] A. As it currently exists, no.

[2257]

#### TESTIMONY OF JOSEPH V. CHARYK

By Mr. FITZPATRICK:

Q. Dr. Charyk, you make reference on the third page of your statement, at least the third page I have, "Technologically a communications system of the future might entail direct broadcasts from the satellite to the home."

Based upon the present knowledge and the state of the art with respect to satellites and the possibility of satellite [2258]

to home telecasting, what is your forecast as to how long it would take to accomplish this technological feat?

A. It would be my judgment that within a period of perhaps five years it would be possible to develop an appropriate satellite and appropriate receiving antenna and related equipment that would permit direct broadcasting from a satellite to the home. This would be from a purely technical point of view.

I would not be commenting on the economic desirability of such an arrangement, simply as to the technical feasibility.

Q. In the last sentence which constitutes the last paragraph of your statement you say, "Although these and probably other advances in communications will be technologically feasible in the future, whether they will be actually introduced and the time span in which they will be introduced will depend on a variety of factors, including" and you go on to name some.

My question to you, sir, would be are there other factors that you failed to include here that you could give us the benefit of for the record or is that all inclusive?

A. My intent was simply to be illustrative. I would not want to say that the list is complete. On the other hand, at the moment I can't think of any other item that I would add. There could well be others.

Q. The metropolitan network that you make reference to [2259] on the second page of your statement—is that the metropolitan network as explained by you in the rest of that paragraph or were you referring to something other than that?

Mr. COHN. Networks, plural, Mr. Fitzpatrick.

By Mr. FITZPATRICK:

Q. Yes, networks, plural.

A. My reference there was to both existing interconnection facilities within metropolitan areas and the ever-expanding terrestrial linkup within metropolitan areas.

We have, as you undoubtedly know, a rather well developed network in most major cities at the present time. This is continuously being expanded in scope and in capacity. I would certainly believe that this would continue to evolve rather rapidly over the coming years.

Q. Can you give us any time estimate based upon your knowledge as to estimated development period for that?

A. I see no particular limit because I think that the demand for communications services of various types will continue to grow at an ever-increasing rate which means that improved and more extensive facilities will be required and these will pretty much continue to grow at a very rapid pace.

It is a matter of degree at any particular moment in time, the extent of the interconnection network that may be available but I think there is little doubt that it will continue to expand and grow.

[2260] Q. Directing your attention to ComSat itself, ITT has directors on your Board, is that correct?

A. Yes, they do.

Q. How many directors does ComSat have?

A. ComSat has 15 directors. Six of these are elected by the public stockholders, six by the communication carrier stockholders and three are appointed by the President with the advice and consent of the Senate.

Q. Does ITT have two of the common carrier directors?

A. Yes, they do.

Q. Do these two ITT representatives participate actively as members of the Board of Directors?

A. They do.

Q. What policy is followed in the ComSat Board when matters come up involving the interests of the carriers themselves? Do they participate as active members of the Board?

A. The carrier directors do not participate in action on items in which they have an interest as far as their own corporations are concerned.

Q. Do they participate in the discussion leading up to the action?

A. They may occasionally participate in the discussion but they do not participate in action. Their frequent opinions are frequently solicited by the other directors.

Q. Have there been occasions when ITT directors have

[2261] stated positions on matters and informed the ComSat directors as to what ITT's position is but them themselves take no action?

A. Yes.

Q. That is because ITT has an interest in the matter before the Board?

A. Yes.

[2263]

By Mr. McKenna:

Q. Dr., do you believe that Congress will have some views to express on the social and political implications of bypassing local stations and broadcasting directly from satellites into the homes?

A. I would be very surprised if they did not.

Mr. J. McKenna. That is all.

CHIEF HEARING EXAMINER. Mr. Cohn.

By Mr. Cohn:

Q. Doctor, I want you to know on behalf of ITT we did not request your appearance here for examination. We were quite happy and content and satisfied with your statement but as long as I have you here I would like to ask one or two questions of you.

As far as the satellite for home communications is concerned, this would also require in addition to what Mr. McKenna referred to the approval of the Federal Communications Commission, would it not?

[2264] A. It would.

Q. Doctor, on the second page of your statement I found it fascinating that in the first full paragraph beginning with the word "Future" you used the word "could" on four separate occasions in that one paragraph before you got to the end of the page. That demonstrates does it not, that your comment that what you were commenting on was the technological phenomenon that of the satellites to home communication rather than public policy or any other aspect of the problem?

A. That is right. I was focusing on what might be technically feasible. I was not commenting on what kinds of political decisions might be made on some of these questions.

Q. Doctor, as far as the last paragraph of your statement is concerned, you have a reference—I am referring now to the second line of your last full paragraph—where you have the phrase “feasible in the future.” There is no way of ascertaining how far that is in the future, is there?

A. Actually I don't think there is a magical date. In other words, I see a gradual change of capabilities along the lines that I have indicated and there isn't any magical date at which the whole system emerges full-blown.

[2290] \* \* \* \* \*

# TESTIMONY OF JULIUS BARNATHAN (RECALLED)

By Mr. ADLER:

Q. What occurred after you went out of your present job to accelerate this colorization process?

A. Right after that it was decided by the television network that they will have all programming at night in color. It was decided in August the following year we would have most of our sports programs in color. It was decided in June of 1966 that Peter Jennings and our news operation would be in color by January of 1967, and in November it was decided that our entire daytime schedule would go color as soon as possible, and that all other programming would go color as soon as possible.

[2291] Q. I believe you testified that when you came into this new assignment you became familiar with the facilities of your competitors. Could you describe briefly the type of production facilities that NBC and CBS have in New York and on the West Coast?

A. In Hollywood, NBC has a plant which is built specifically for television. It has four large studios and two smaller studios, an entire technical support area, all the other production requirements such as production services, make up, costume, drapery. It has rehearsal halls, office space for production peo-

ple, all under one roof, and it is all completely self-contained and very efficient.

In Hollywood, CBS at Fairfax has a completely self-contained production studio complex technical corps, up to date, modern facility, all in one location in one particular building.

In New York, CBS at 57th Street and 10th Avenue has completed reconstruction of the Sheffield Farms Building into a modern, up to date, technical center, housing six television studios, a completely computerized, automated switching system with the most up to date lighting, modern techniques of switching, modern techniques of production, all within the single complex. They have their production services buildings, rehearsal halls, studios, news personnel, all contained in one building.

[2292] NBC at the RCA complex on the fifth floor has its entire technical center complete on one floor. It has its studios in the same building. It has huge production halls in which storage of scenery can be had all in one building, and in Brooklyn it has two huge studios, 11,000 square feet.

Mr. HUNTER. I am going to object when he continues to use adjectives such as modern, update and huge.

CHIEF HEARING EXAMINER. Eliminate those and proceed.

[2293] By Mr. ADLER:

Q. Go ahead.

A. It has two large television studios of 11,000 square feet each which you can do any production that is required, any type of production.

Q. Mr. Barnathan, I show you AR-37 and ask you if you would read the first two paragraphs and then comment on that, please. It is in the record.

CHIEF HEARING EXAMINER. If it is in the record, I am sure that will be enough.

By Mr. ADLER:

Q. Would you state briefly what that is and then comment on it, please?



Mr. HUNTER. Mr. Examiner, I think the document speaks for itself. I see no reason for the witness to comment about it.

CHIEF HEARING EXAMINER. What is the reason for turning the witness loose here?

Mr. ADLER. I can ask him a more specific question if they don't accuse me of leading.

By Mr. ADLER:

Q. Would you please compare the present ABC situation with the CBS situation described in that document?

A. ABC's situation is exactly the same position that CBS was prior to the time that they built the technical [2294] center in New York. Primarily, we built things as we needed them in a helter skelter way as the requirements continued to grow.

It was expanded piecemeal and many of our portions are over 15 and 20 years of age, and that what was required was to replace this with a modern, objective, efficient plant capable of producing high-quality product.

I might add this has brought to emphasis more so today because of color and I believe when CBS did it, they were talking about black and white at the time.

Q. Do you know, Mr. Barnathan, when CBS put its network schedule in color?

A. The nighttime color, I believe, was in the fall of 1965. They will have according to the press releases all their daytime shows in color by the fall of 1967.

Q. Is CBS News in color?

A. Yes, CBS News went in color in September of 1966.

Q. Mr. Barnathan, as vice president in charge of operations and engineering, what do you try to achieve in terms of operating performance?

A. Our objectives are to produce the best quality picture, minimizing operating errors and efficient production techniques.

Q. Could you describe, sir, or tell us whether your present facilities are conducive to these objectives?

A. They are not at all conducive to this type of operation [2295] plant-wise, technically speaking and location-wise, we

do not have—it is not easy for us to obtain top quality and minimize errors in the current configuration of the ABC plants both in New York and in Hollywood.

Q. Could you specify what attributes to errors on the air?

A. The errors on the air are done because many times the programs are produced many days in advance, many weeks in advance, two weeks in advance. Advertisers would like to place their commercials as late as possible, sometimes two and three days prior to air.

In that particular case, we object and they say well at CBS and NBC, they don't object and always do it.

Q. Who is they?

A. The advertisers. They come back and say, we can do it at NBC and CBS but not at ABC. CBS, there they have an automated film chain, automated film machines and line them up and at 10:25:35 it automatically switches and activates the film chain, puts it on the air, deactivates it, starts the tape machine again and goes right back on in again.

We have to take the tape machine, roll it on the air, have another studio which will roll in manually without by hand, without any form of communication except a TD, a technical director advising the film projection is the or the video tape operator to roll the machine, and this causes many serious errors.

[2296] And a commercial today——

Mr. FITZPATRICK. Mr. Examiner, he has gone well beyond being responsive to the question.

Mr. WHIPPLE. We can't hear you, Mr. Fitzpatrick.

Mr. FITZPATRICK. I said he has gone well beyond being responsive.

The WITNESS. Might I make one more point?

Mr. FITZPATRICK. Objection.

CHIEF HEARING EXAMINER. Proceed with the questioning.

By Mr. ADLER:

Q. What are the consequences in terms of operating performance and efficiency of your dispersed location of your studios in New York?

A. That fact that our studios are dispersed, the fact that our film services area is dispersed, the fact that our technical areas are dispersed means that we cannot service our producers and customers properly.

We do not have proper facilities for them, we do not have dressing rooms for them, we do not have dressing halls, we do not have office space for them.

We do not have places for them to reproduce scripts. We do not have the necessary items to be competitive with CBS and NBC. We have to have additional staff to bring things from one location to another. We have to have communications instead of physically being able to talk to various people.

[2297] It is done by phone which sometimes causes problem and sometimes there is misunderstanding because of lack of communication and it is most difficult to operate a factory located in many different places.

We do not have a factory in one location so that we can put the product together.

Q. You testified earlier in the day about production services. Could you explain a little bit what is meant by production services?

A. Production services includes the scenic artist who designs the sets, the graphic artist who designs the various graphic arts that are used on the show, the carpentry department which builds the sets, the painting department which paints the sets, the electrical department which wires them electrically, the drapery department which supplies the various drapes which are necessary, the costume department which supplies the necessary costumes for the various programs that are involved, the studio supervisors, the stage hands and the various other personnel that are required.

Q. In your setup in New York, where is your production services department located in relation to the studio?

Mr. HUNTER. I believe that is already in the record.

CHIEF HEARING EXAMINER. Hasn't that been clearly shown?

Mr. ADLER. I am developing a point of what are the consequences in terms of efficiency that result from the location of

your production services department away from the studios.

CHIEF HEARING EXAMINER. Proceed.

The WITNESS. The fact that our production services department is away means a tremendous amount of trucking; since we do not have place to store sets, it means we have to strike many sets in order to use the studio and relight to reuse the same studio.

This is very, very inefficient because if it was possible to just move the sets out of the studio and into the corridors as is possible at NBC and CBS——

Mr. FITZPATRICK. I am going to object. This witness is not qualified to testify about NBC and CBS.

CHIEF HEARING EXAMINER. Sustained.

By Mr. ADLER:

Q. Are you familiar with the facilities there?

A. Absolutely. I visited them and I have seen them do shows. I have seen them do Ed Sullivan, Johnny Carson, I have been out in Burbank when they were shooting programs and I was in Hollywood when they were making my show.

They were making my show last year for me.

Q. Why was that?

A. Because we didn't have the facilities for them to do it on ABC—Brigadoon. We know their facilities. They see our facilities.

[2299] Mr. ADLER. I believe he is qualified to answer.

CHIEF HEARING EXAMINER. Have you concluded?

By Mr. ADLER:

Q. I believe Mr. Witness——

A. I was saying——

CHIEF HEARING EXAMINER. Nothing pending.

By Mr. ADLER:

Q. I believe you were describing the consequences of having your production services located away from your studios. Had you completed that answer when Mr. Fitzpatrick interrupted?

A. It is most difficult particularly in color because if you have to make a change, the set has to be retrucked all the way back to 70 Street instead of anywhere near the facility.

Q. Will you state what the consequences might be in competitive terms of the situation you have just described?

Mr. HUNTER. Object to that as purely speculative and leading and there is no definition of what he means by competitive.

Mr. ADLER. In competition with NBC and CBS.

CHIEF HEARING EXAMINER. He may proceed.

The WITNESS. The producers who produce for ABC produce at CBS and NBC and we are continually being asked why can't we provide them with the same facilities that CBS and NBC provide.

Continually, we have to hold their hand and tell them we [2300] are working on it, we are going to try to get it for them but at the same time we know that our facilities at the present time are nowhere near competitive to CBS and NBC.

We don't have the screening rooms for them to screen their products and we do not have the same facilities in terms of being able to provide them with the type of things they need, the editing space and the tape room is absolutely abominable.

We have four tape machines in the location where CBS and NBC have two machines.

[2301]

Q. Would you refer to AR-25, please?

CHIEF HEARING EXAMINER. The witness has the exhibit.

By Mr. ADLER:

Q. Will you note the date on that exhibit, please?

A. November 4, 1966.

Q. At that time, was there any request pending from the FCC for information from the parties to this proceeding?

A. I am not aware of it.

Q. Do you recall, sir, what was the status of this proceeding at that time?

A. It was in deliberation by the Commission, I believe, at that time.

Q. You have testified, I believe, as to the circumstances under which this was prepared?

[2302] A. This was prepared for a two-year estimate so that we can include the year 1968 which involved a huge expenditure

year for us because of our commitments to the Winter Olympics, Summer Olympics, Summer Conventions and Elections.

Q. To the best of your knowledge, at the time, sir, was it a reasonable and accurate forecast of your expected expenditures?

A. It was a reasonable and accurate forecast of expenditures with some of the figures in here which were carried forward from other reports.

\* \* \* \* \*

Q. Why did you prepare Attachment B to AR-3?

A. In December Executive committee meeting, I went forward with a request for certain funds and at the request of Mr. Coleman, he asked that I prepare a long-term estimate or projection so that the board would know what the total picture of our expansion plans and our total future plans for colorization [2303] and expansion were for ABC.

This was done at the December board meeting and this document was in preparation and being prepared for our board meeting of February 13. This document was in the works for many, many weeks prior to February 1.

Q. Were you ever told that this document would become an exhibit in this proceeding prior to the time it was prepared?

A. No, sir.

Q. I would like you to compare Attachment B to AR-3 and AR-25 and if you would identify items where the increase was substantial. By that I mean in excess of a million dollars.

A. These are just the differences between the two.

\* \* \* \* \*

[2306]

Q. The Tech building in New York is three million dollars higher in the February report, that is, the whole group of items. That was gone into rather thoroughly by Mr. Hunter.

A. Most of that is the routing switcher and the electrical [2307] terminal installation work required in the technical building.

Q. A second rather major item is on the Colonial and Ritz studio theaters in New York.

You explained that. I would like you to clarify if you can why it is appropriate to project expenditures here of about four mil-

lion dollars in view of your testimony that you may never actually colorize that Colonial studio and the fact that you would rather not.

A. If we were presented with a program called a John Doe Show which was going to be a variety program which needed a theater television studio and we did not have any other, we would be forced to colorize the Colonial or the Ritz, and that is why we have kept this in as a contingency based on programming requirements.

Q. The New York production center, I think, has been discussed. In your opinion, is that a reasonable forecast of what that center would cost if it were built?

A. I think it is low. I think it is going to cost more than that once we get into the nuts and bolts of the construction costs of what we are talking about.

Q. Is it your opinion as the person in charge of operations and engineering for ABC that that center is needed?

A. Absolutely essential. It is essential now and it is essential for the future and if we don't start it now, we will never have it in time. We will never have it.

[2310] By Mr. ADLER:

Q. If ABC is able to proceed with the colorization of its present studios but is not able to proceed with the plant developments projected in New York and in Hollywood for new studios, production center, technical center and the like, would its production facilities be comparable to those of NBC and CBS?

A. No, they will not be.

Q. In what ways will they be deficient?

A. We will not have the flexibility that they have, we will not have the technical stability and the technical performances that they will have.

We will not be as efficient as they will be—

[2311] By Mr. ADLER:

Q. With your present studios without the new studio facilities projected in this expansion, can you in Hollywood—let



us take Hollywood first, at this time provide studio facilities for additional live dramatic program or for any live dramatic program?

A. Every studio in Hollywood is completely used up. It is used to the ultimate at the present time. We could not produce another regularly scheduled dramatic show in Hollywood at this time.

Q. You were asked on the cross-examination, about certain meetings that took place in November 1966 at which your spring and summer schedule was discussed and plans made to move some programs to Hollywood.

Did that decision in your opinion obviate the necessity for studio facilities in New York as projected?

A. No, sir. We still need the studios in New York and we still need the facilities in Hollywood.

Q. With your present studios in New York, leaving to one side the facilities projected at the 66 Street complex, can you provide facilities for a large dramatic show?

A. Not at the present time.

Mr. HUNTER. I object. There is no foundation.

CHIEF HEARING EXAMINER. Sustained.

[2312] By Mr. ADLER:

Q. Could you provide facilities for a musical type show like Brigadoon or Carousel, of that type?

Mr. FITZPATRICK. Mr. Examiner, we would have to know whether this is a live show, taped film or what.

Mr. ADLER. I am talking about a live musical show.

CHIEF HEARING EXAMINER. I will let him answer.

The WITNESS. No, we cannot.

By Mr. ADLER:

Q. Can you provide facilities for a live dramatic show in New York?

A. No, we cannot.

Q. Have you had special programs on the ABC Network in the past year of a dramatic or musical nature that were not produced in ABC studio facilities?

A. Yes, we had quite a number of them. They were produced at our competitors.

Q. Could you name some of those and state where?

A. Brigadoon was produced at CBS, Tony Bennett Show at NBC. I am trying to think of names of some of the specials that went on.

Q. Are you planning to put on a Robert Goulet Show?

A. Yes, we are planning to put on Carousel and that was being produced at NBC.

Q. I believe Stage 67 was mentioned.

[2313] A. Many of the Stage 67's were done at CBS, NBC, and some of them were done on film and some were done in London.

Q. Does the use of NBC or CBS studios by producers on your network present any competitive problems to ABC?

A. Yes. It is a competitive problem.

It is also a very demoralizing problem to our own people who would also like to do the work and it also causes us labor relations problems.

CHIEF HEARING EXAMINER. From a competitive standpoint?

The WITNESS. From a competitive standpoint, yes.

CHIEF HEARING EXAMINER. Proceed.

By Mr. ADLER:

Q. Do the networks desire to be able to offer to producers if they want to use it, efficient and effective studio facilities and production services and that sort of thing?

Mr. FITZPATRICK. Objection, he is not qualified to speak for NBC and CBS.

Mr. ADLER. He is familiar with the business.

By Mr. ADLER:

Q. As the person in charge of operations and engineering for ABC, do you try to offer to a producer the most efficient and suitable studio facilities?

A. Yes.

[2314]

Q. Mr. Barnathan, with regard to your projected studio expansion, are there any areas of design or engineering which you believe that ITT could be helpful in this development?

A. Yes. They could be helpful to us in helping us [2315] prepare our new plants for computer work which we would like to eventually use computers in our plants, modern plants to help us in automating some of our equipment.

We believe they can help us in the areas of design of industrial engineering to show how work flow should go or help us lay it out.

We believe they can help us with air conditioning——

CHIEF HEARING EXAMINER. Excuse me, sir, isn't all of this established in the record either in September or in this month?

Mr. ADLER. No, sir.

CHIEF HEARING EXAMINER. Proceed.

Mr. FITZPATRICK. ITT told what they feel they can do with the merger—if it takes place. What ABC thinks ITT would do, I don't think is probative evidence.

Mr. ADLER. I think it is important for ABC to indicate its shortages and where it would look to ITT for help.

CHIEF HEARING EXAMINER. If they are deficient, they would expect aid from ITT?

Mr. ADLER. Precisely.

CHIEF HEARING EXAMINER. Proceed.

The WITNESS. In the area of telecommunications and internal communications systems, we believe they could be most helpful to us in designing our equipment for plant use and remote use.

[2316] By Mr. ADLER:

Q. I refer you to AR-42 about which you were questioned this morning. I believe the testimony was this morning that these were items of development which you had referred to ITT for their consideration.

When problems of this type arise now or arose in the past before ITT came into the picture, did you have technology within ABC to deal with these types of problems?

A. We do not have the staff to deal with these types of problems. We can normally define the problem and then hopefully, go to a manufacturer and try and interest him in solving such problem, but our problem in this way, unless the product itself will have a large market, the manufacturer is not interested in getting involved in it because he has too few people or they are

all busy working on other projects which can be far more productive than the projects that we might find most essential.

Q. Have you in the past been able to get manufacturers to do research and development type work for ABC?

A. Yes, we have been able to get certain manufacturers where they had an interest in that particular product and they felt there was a market.

We have been able to get them interested after we make a commitment for a sizable commitment to develop it and pay for part of the development and agree to buy a certain number [2317] of such product.

CHIEF HEARING EXAMINER. How much more do you have?

Mr. ADLER. About 10 or 15 minutes.

By Mr. ADLER:

Q. Are you familiar with the research and development technology that is available to your competitors, NBC and CBS?

A. Yes, I am familiar with the technology that is available to them.

Q. Would you describe it, please?

Mr. KESTENBAUM. I object.

Mr. HUNTER. I object. I doubt very seriously whether this witness has available information on secret technology and research projects of CBS and NBC.

Mr. ADLER. Excuse me. I am not talking about secret technology. I am talking about research and development facilities that are available to NBC and CBS.

CHIEF HEARING EXAMINER. Objection overruled.

You have your exception.

By Mr. ADLER:

Q. Are you familiar with a company called CBS Labs?

A. Yes.

Q. How are you familiar with it?

A. I have visited them. They are customers of theirs.

Q. Continue.

A. I have been through the plant. I have been seeing the [2318] projects that they are working on.

Q. What sort of work do they do?

Mr. FITZPATRICK. Objection, Mr. Examiner. Just because he visited the plant does not qualify him.

Mr. ADLER. He is a customer of it.

CHIEF HEARING EXAMINER. He visited it. He can tell us what he saw.

Proceed.

Mr. KESTENBAUM. He is not being asked about work done for NBC. He is being asked about the general scope of the function of the company.

CHIEF HEARING EXAMINER. How often did you make the inspection? Tell us what happened.

The WITNESS. I visited the plant in March 1966. That time I saw the equipment, the test equipment, the engineers they have and the various projects that they were working on. They were working on several Government projects.

They were working on several industry problems. They were working on some specific problems for CBS. Certain modifications that were customizing various standard equipments for the use of CBS at that time.

They were also working on the project that we were most interested in, that CBS could not get a manufacturer to be interested in and CBS Lab had undertaken the job of working on this one piece of equipment which we were interested in.

[2319] They showed it to us. They said they would make it available to us after CBS had gotten the quantity that they needed. The lab people that I met at the lab are very knowledgeable about our broadcast business.

They are knowledgeable about the CBS broadcasting and they are knowledgeable about the various requirements, technical requirements for our industry.

Mr. FITZPATRICK. Mr. Examiner, we must recognize we have opened up completely new doors on redirect that were never gone into on cross-examination.

Mr. ADLER. This was opened up on the direct.

CHIEF HEARING EXAMINER. I don't know how long the Department will want the witness, or Mr. Fitzpatrick. We could be here three or four hours.

Sir, will you be here in the morning? We have had a pretty full day here and you have too.

The WITNESS. Yes, I will be here in the morning.

CHIEF HEARING EXAMINER. Is that your plan?

The WITNESS. It wasn't my plan, but it will be my plan.

CHIEF HEARING EXAMINER. What do you say here? We have been at it since nine this morning.

Mr. ADLER. I can wind it up very quickly, your Honor.

CHIEF HEARING EXAMINER. Yes. But the Department has extensive inquiry, I am sure.

[2320] Mr. J. McKENNA. In the interest of shortening the line of questions, we have in the record here the annual reports of RCA and CBS. It so happens the annual reports describe what both of those companies do in these areas.

CHIEF HEARING EXAMINER. Very well, sir.

Mr. FITZPATRICK. Then all this evidence has been cumulative.

CHIEF HEARING EXAMINER. Then they speak for themselves.

Mr. J. McKENNA. I assure you it will take just a second. The TCA annual report says for television and radio broadcasting—

Mr. KESTENBAUM. I object to reading documents in the evidence.

CHIEF HEARING EXAMINER. It is in the record already.

Let us proceed.

By Mr. ADLER:

Q. Mr. Barnathan, are there some areas of new technological development somewhat in the future that are of interest and concern to ABC?

A. Yes, sir.

Q. Will you describe what some of those are?

Mr. FITZPATRICK. Mr. Examiner, this witness is not qualified. I would like to find out where we are going in new areas in technology. This man moved into this job in 1965. He has been in operation since then.

[2321] He has not qualified as an engineer or has any knowledge on technology other than working on the estimates for ABC on construction.

Mr. ADLER. He had responsibility for keeping ABC on the air. If new developments come along that impinge on that, he has got to be able to deal with it and I think he is knowledgeable.

Mr. FITZPATRICK. That has not been established on this record that is one of his responsibilities.

The WITNESS. It is one of my responsibilities.

Mr. FITZPATRICK. I move to strike the comments of the witness.

It is totally uncalled for.

CHIEF HEARING EXAMINER. I will let counsel proceed for the time being.

By Mr. ADLER:

Q. Proceed. What are some of these areas?

CHIEF HEARING EXAMINER. Specifically, sir.

The WITNESS. Specifically, that the spectrum, the radio spectrum is getting very crowded, that we are going into higher and higher frequencies so that we can get more and more use of the radio spectrum.

Our requirements for mobile operation, particularly in the field of news, particularly in the field of instantaneous sporting events, is to have more and more cordless equipment, [2322] whether it be a news vehicle on the run, whether it be a television camera—all these items which require great mobility.

What we are looking for is a way to Multiplex signals so that we can get greater use of the frequency, the channels that now exist. To use the higher channels, the 18 megacycle, the higher band widths, using lasers to allow us to find ways to have greater means for the use of communications, telecommunications in these frequencies, this is an absolute essential.

By Mr. ADLER:

Q. Are there some other areas on the horizon, Mr. Barnathan?

A. The other area that we know of is the area of three-dimensional television in terms of stereo television in terms of pictures, to be able to have three-dimensional television, large picture television, the improvement of the signal, itself, in terms of the transmission of the signal.



These are various needs of our industry and of ABC.

Q. Does ABC have technical competence within itself to deal with some of these areas that you have been describing?

A. No, sir, particularly in the field of telecommunications, ABC is almost totally dependent on what AT&T will develop and provide for in terms of the telecommunications area.

[2323] Q. Do you understand that ITT has capability in these areas that would be helpful?

A. Yes, I understand that they do. I hope they will be helpful, yes.

Mr. FITZPATRICK. Objection, Mr. Examiner.

CHIEF HEARING EXAMINER. Let it stand.

Mr. ADLER. May I have a moment, your Honor. It has been a long day of cross.

CHIEF HEARING EXAMINER. Yes.

Mr. ADLER. No further questions.

CHIEF HEARING EXAMINER. How long will the Department want the witness for further examination as a result of this?

Mr. HUNTER. I only have ten minutes I suppose.

CHIEF HEARING EXAMINER. Mr. Fitzpatrick, how much longer will you want the witness as a result of this?

[2326]

By Mr. HUNTER:

Q. You mentioned about producers coming and saying why don't you have facilities like CBS and NBC.

A. Right.

Q. Isn't it a fact that producers are crying to get on your network? They want to get on your network? They want to produce a show? A producer would produce something in a barn, would he not, in order to get a show produced?

A. That is correct.

Q. You also testified concerning the cost efficiencies of NBC and CBS. Are you privy to their cost accounting documents?

A. I have their rate cards.

Q. Their cost accounting documents?

A. I have their rate cards. Can I have the question again?

Q. Are you privy to their cost documents?

A. No, sir.

Q. Has NBC or CBS ever requested use of ABC facilities?

A. NBC has. CBS has. They have asked if something was available.

Q. This is a common occurrence at the networks?

A. They have asked us once in a while where our people are asking much more often.

[2327]

Q. You mentioned that ITT could be a possible aid in the computer area?

A. Yes, the programming for computers.

Q. So if there were a merger would you take competitive [2328] bids on programming systems or would you use ITT?

A. Would I take competitive bids? I am not bidding. I am asking them to help us with the programming for the computer, to set up a program to show what systems we would use.

Q. Would you ask anybody else?

A. We would first ask them.

Q. The same would be true for your air conditioning?

A. Yes, I would ask them first.

Q. Communications Systems?

A. Yes. In that particular case I would ask other people, AT&T.

Q. How about colorizing your studio?

A. No.

Q. Systems work?

A. Systems work, yes.

Q. You would ask them first?

A. Possibly. It depends on the capability that we are looking for.

[2340]

Mr. FRIZPATRICK. Mr. Examiner, if I might, one preliminary matter. That I started Friday and everybody I believe asked me to postpone it. I would like to read into the record some information furnished to me by counsel for ITT. That deals with

the Avis Rent-A-Car and the amount of purchases that was done by the ITT subsidiaries with the Avis Rent-A-Car for a specific period of time. The ITT and its subsidiaries domestically in 1964 spent some \$54,000 with Avis. In 1965 they spent some \$335,000. Now with 1966 they spent \$632,000. Now I had asked but I have not yet to date received information as to what each one of those figures represents as the total car rentals for each year. Apparently that information has not been prepared yet. I am still awaiting that for the record.

[2350]

# TESTIMONY OF SIMON B. SIEGEL

By Mr. KESTENBAUM:

Mr. KESTENBAUM. Let me drop it. If the witness is not familiar with that number I would like to discuss incidental subjects of the margin between their revenues and your revenues. What I am using as a means of discussing this, sir, is the Exhibit J-273, which is an excerpt from Broadcasting Magazine, February 6, 1967, entitled, "What Participations Really Cost."

May I show it to you?

The WITNESS. Please.

By Mr. KESTENBAUM:

Q. Now, if we run down the broadcast day, the first difference in revenues between ABC and the other networks is that you don't have a show, you don't have anything on the air from the sign-on until 10 a.m.?

A. That is right.

Q. At that time, NBC is way ahead of CBS obviously from the figures, which I take it is attributable to the "Today Show." If we jump for a moment to the other end of the day, the [2351] late night period, 11 p.m. to sign off, again NBC is far, far ahead of either the other two networks. I take it that is attributable to the "Tonight Show." You are ahead of the CBS at that time, but that is not a meaningful number. They are both very low. Where do the revenues come from from 11 p.m. to sign off?

A. These are local stations.

Q. These are network billings, I think?

A. Our network has not been on after 11, so it can't possibly be network income for us. I can't talk about the other networks. I would like to correct that statement. Starting with last night we are on.

Q. I understand that, starting from last night I assume this figure will zoom up?

A. I hope.

[2352] Q. In any event the difference between the low figure or what perhaps might be zero for the late night, the difference between that and whatever you are going to show during the coming months will be the fact that you are now putting on a late night show.

A. Yes, sir.

Q. From 10 a.m., if we go back to the beginning to the middle of the broadcast day, 10 a.m. to 6:00 p.m., as we heard before CBS is by far dominant in the daytime segment.

A. I will testify to that.

Q. While you are behind NBC, you are both about half of what CBS is doing during that period?

A. Yes.

Q. Then 6:00 to 7:30 p.m., CBS and NBC are fairly close and you are far behind at that point. This is attributable to what?

A. The only network show we would have in this time period would be the news. We do not recover as much of the news as either one of the other two.

Q. Do they have other network shows between 6:00 and 7:30 besides the news?

A. Not that I know of.

Q. Then we move into the prime time segment, 7:30 to 11 and there we find as you indicated earlier, a fairly close lineup of the three networks. You are a little bit behind but [2353] it is quite close in terms of network cumulative revenues for that month of January. This is attributable to your competitive strength I take it in prime time? I should not say it is attributable to that. It is an index of your competitive strength.

A. Yes, we are more competitive at nighttime than we are the rest of the day.

Q. When you say you are more competitive at night, will you explain what you mean by that, sir?

A. That we have made further progress at that time in our nighttime programming. May I explain it in reverse. I don't want to editorialize but I do want to answer your question.

Q. I take it a commercial is acceptable?

A. When we got into ABC we had to build it block by block. The first block of course and the most important is prime time. So that has had the most attention all through the years. Actually we didn't get into daytime until the fall of 1958.

It has been a slow but I hope steady build. So, because of the concentration on nighttime we would show more improvement there. I hope five years from today we can say the same thing about the daytime. The daytime, you are dealing with a much smaller audience, much more habit effect, with women in the daytime. Word of mouth does not help you in the [2354] daytime. No women will admit not even to another woman that she has time during the day to watch television. So it has been a struggle.

That is not true in prime time, though. Actually there has been more concentration on nighttime. We have been in it longer. I think we are a little more professional.

Q. During the nighttime period I take it you are getting pretty good rating, pretty good rating through your primary affiliates? This is the cause of the good showing that you have in revenues?

A. I think it goes beyond the primary affiliates. I don't have the exact figure but I think our average nighttime show was carried on about 1700 stations, which is far beyond our primary affiliates.

It is the strength of your programming that can get you into the one and two station markets that will help the nighttime.

We have not succeeded in cracking that in the daytime—yet.

Q. I take it then that if we look at nighttime as the way you perform and you have strong programming, that to the extent that you have problems which result from a difference in coverage of primary affiliates, it is the nighttime that gives you some real measure of that difference; is that correct?

[2355] A. It gives us whatever measure of difference you know we can establish at this one particular time.

Q. During the other parts of the day, as we pointed out, you have problems because you have not had programming in early mornings and late night, until recently late night. And during the daytime you are just building up programming as you say?

A. I am not sure that that is the only reason for not clearance in the daytime. I think we have had some pretty good shows in the daytime but yet we have not been able to move them.

Q. Have you not been able to move them on your primary affiliates?

A. No, I am talking now about secondary.

Q. You do get 120—

A. 123, a full lineup, basic affiliates which is something like 123.

Q. I think the figure before was 127. I think it is in the running. You are now running from this January figure, you appear to be running somewhere between 27 and 28 percent of combined network revenues when we take the whole broadcast day and 31 percent of the prime time revenues.

Would that figure—

A. It sounds high to me in the daytime.

Q. The 27 percent is not a daytime figure. It is an [2356] overall figure. And the difference between the 31 percent and the 37 percent is attributable to the poor showing in the daytime and other parts of the day.

\* \* \* \* \*

[2357] \* \* \* \* \*

Q. We had a big jump in program rights in the course of the past year. If we go back to the 1965 annual report—let me take one figure first, property and equipment net was \$74 million.

Can you tell us how much of that property and equipment was broadcasting division property and equipment?

A. I think at that point it was fairly evenly divided.

Q. You mean it was \$35?

A. \$37 or \$38 million for one or the other.

\* \* \* \* \*

[2388]

Q. If we can go back to the letter of July 25, 1966, another number in that same paragraph to which we were referring a moment ago was the following:

Approximately \$90 million for constructing and equipping new studio complexes to be built in New York and Los Angeles as part of our long-range plan.

Could you tell me when you had that number, sir, and how you received it?

A. I received a request from our lawyers to try to put together the entire cost, whatever reason or whatever request they may have had I can't say but they did feel that they wanted an overall projection of what it would cost to do [2389] what we thought or what our engineering department thought, and our construction department, over the foreseeable future, the next few years.

I asked Frank Marks, who was then the head of our construction department, to get together with the engineering department and try to get numbers together, that I wanted them to be very reasonable estimates though I didn't believe we had time for a year and a half study kind of thing, and those figures were the result of that particular study.

Q. Is there any document that reflects that number, sir?

A. No, I don't believe there is any document that reflects that number. It was a combination of different documents from different areas.

Q. Did you add it up on a piece of paper or where did it come from?

A. Mr. Marks did.

Q. Mr. Marks added it up on a piece of paper?

A. Right.

[2391]

Q. Yesterday we talked a little bit with Mr. Barnathan about a document called AR-12 which contained some prices. I believe the total on that is \$12,464,000.

A. That is correct.



Q. Did you have any other estimate for Hollywood beside that one estimate? Mr. Barnathan said it was a partial estimate. Did you have any other estimates?

A. For Hollywood you are talking about?

Q. Yes.

A. I think there was an estimate on the erection of a new building for the technical center in addition to this.

[2392] Q. Could you ask counsel to direct our attention to that if we have received that document.

Mr. BERGSON. You have received all the documents we have.

The WITNESS. I know there was some discussion, my recollection is we were talking about between the two new studios, a technical building for Hollywood closer to 16 or \$17 million than we were \$12 million.

\* \* \* \* \*

[2394] Q. But at the time the estimate was being made in the July letter you didn't have any more details planned on that subject following the Austin report?

A. No, sir.

Q. Now, turning to New York, you had another Austin report for that which is AR-39. Do you recall having seen that, sir?

A. I remember a lot of meetings discussing it, although I am not sure I read the full report by myself. A lot of it is too technical for me. You are getting me into a field, boy, where you can really make me look bad.

Q. I am not trying to do that. There was a discussion, however, quite an intensive discussion on the subject of the Austin report after it came in—when was that?

A. Sometime in June, 1966. June 20, 1966.

Q. And there was a meeting on the Austin report, was there not?

A. Yes, sir, there was.

Q. Do you recall that meeting?

A. I would guess the meeting may have been a month after we received the report. Copies had been circulated to all the operating departments or all the departments that would have been involved in the 66th Street production center.

Q. What was the upshot of that meeting, sir?

A. The upshot of that meeting was that we rejected [2395] the Austin plan. It pleased nobody, including me. I guess that is about as blunt and as forthright as I can make it. We flatly rejected the plan.

Q. Since that meeting took place?

A. It took place July 1966.

Q. So that what you had then was this one plan, the one plan for New York which you had rejected. Could you tell us how you arrived at an estimate for new studios in New York under those circumstances?

A. Let me say that we had had previous Austin plans over the years. They did do our designing for what we presently have today and they have over the years. This was not the first report we received. This was the first report where we would utilize our entire center and lay it out. Once we were locked in we would be locked in with whatever mistakes we made. Actually what we priced out was the previous suggestions in the previous Austin plan.

Q. What previous plan are you talking about?

A. They had made one back in the 50's. The ultimate long-range use of our property which changed so drastically.

Q. It was not worth much in 1966, was it?

A. Yes, it was.

At that point their basic presumption was that we would build much more vertically than in this last thing, utilize our land and our space much better. They suggested a production [2396] center right in the center of all our studios.

Mr. KESTENBAUM. Can we ask for a copy of the 58 Austin study?

The WITNESS. Don't pin me for a date.

Mr. KESTENBAUM. I am referring to your counsel.

Mr. BERGSON. We can furnish it.

By Mr. KESTENBAUM:

Q. We have heard a lot about the dynamic state in which television broadcasting is and how color conversion has moved at a much more rapid rate than anyone has predicted. Aren't there a great many changes from 1958 to 1966?

A. Utilization of space is still the same problem in 1966 as it was—except in 1966 we do own a lot more land than we did in 1958. That really caused the re-study.

Q. Let me see if this is what you are trying at, sir. The 1958 one was more sensible in terms of utilization, more practical in terms of how the property and land that you owned was going to be utilized. It is not that all the plan could be utilized?

A. No, but it was the principal.

Q. The fact is that in July, having rejected that report you did not have a plan which is in any way specific for what was going to go into that property?

A. No, sir, and we still don't.

[2403]

Q. Do you have any knowledge of requests they made at that time or information which was provided during that time related to the capital needs of ABC?

A. The only knowledge I have reverses the question, our trying to get guidance and help from them during that period on our capital expenditures.

Q. What was that contact, sir?

[2404] A. Contact of mine directly with Mr. Geneen.

Q. When did that occur?

A. I believe it was Mr. Goldenson and I and Mr. Ehrlick had been invited over when they had their Christmas board meeting which followed the December 7 meeting to have a drink and shake hands with the board kind of thing.

I am trying to recollect now exactly what happened. Mr. Geneen came over to me and I am not a very social person so I was standing off in a corner by myself and he said, "Don't look so worried, everything is going to work out all right."

I said, "I wasn't particularly worried about that but I am becoming very concerned over the amount of capital expenditures we may have to make and while our engineers, I thought, were very capable, they were very capable broadcast engineers, we had no research to fall back on for guidance. Every time I saw figures, I was just a little more frightened and I would appreci-

ate if he could assign somebody for our guidance, somebody who knows more about systems, about equipment, about technological advances that may make what we are doing today obsolete three years from today."

He said that he would have Dr. Busignies who is their chief and I don't know his exact title and I imagine technicians, research man, get in touch with me and see if I could explain exactly what I wanted.

That was the first contact.

[2405] Q. Did Dr. Busignies get in touch with you?

A. Yes, actually I waited a couple of weeks and I didn't hear from Dr. Busignies and I called him. I thought maybe because of the couple of drinks we all may have had that Mr. Geneen didn't remember it but Busignies said yes, he had been told about it, that he had to leave for Brussels, but immediately on his return, he would get in touch with me.

He visited in my office on February 7.

Q. What happened then, sir?

A. We discussed what I wanted. He wasn't quite sure what I wanted. I explained our problem. I explained our lack of scientific research. We test equipment after we buy it and not before and that sort of thing.

He said now that he understood fully what I wanted, he would look for somebody like that. Shall I finish the whole story?

Q. Yes, go ahead.

A. About a month later, I believe it was March 12, I visited him at his office and he had Mr. McCabe, he is head of their executive personnel there.

They went over the resume of two men on their payroll. I don't think either one of them filled the bill. They lean too far on the research side with very little broadcast experience.

I told them that I would prefer that they continue looking, that we may end up with one of these, too, by lack of choice.

[2406] I thought they had not hit the thing on the mark. Finally a month or two later, they said they felt that they had found the fellow whose name was Benham and they would

like me to interview him and talk to him and see if he fit the bill.

I did and he did. Sometime later they hired Mr. Benham.

Q. When you say hired, had he been an employee of ITT at that time?

A. No, he had not.

Q. He had not been an employee of ITT?

A. No, sir.

Q. What was he doing at that time?

A. He had his own engineering consulting firm so far as I know.

Q. About what time did he go to work for ITT?

A. I can't answer that. I just don't know.

Q. If I suggested Mr. Barnathan said his first contact was about August of that year, would that be about right?

A. He may have hired him before. That may have been Mr. Barnathan's. I just don't know the date they hired him.

Q. In any event until Mr. Benham went to work there was no real channel of information for exchange of ideas or data on your capital program in detail, was there?

A. Except in my conversations with Mr. Busignies, I kept telling him this was getting more critical, the figures were going up all the time.

[2408] \* \* \* \* \*

Q. Did you around that time, sir, hear that a gentleman named Norton Symon was buying stock in ABC?

A. I was aware of Mr. Symon.

Q. When was that?

[2409] A. I just don't know. If that is important, I can get the dates for you.

Q. Would you say it was before February '65 or after February '65?

A. It was before February '65 I believe he started buying.

Q. Do you have any idea how much he had in February '65?

A. No, I don't, not offhand.

Q. Was this a continuous process during this period?

A. He was buying in rather small amounts. Sometimes we couldn't be sure whether it was in the name of Norton Symond

or McCalls or Hunt Foods. Sometimes if you buy in the name of the nominee, we just don't know.

Q. Did this become a subject of concern to the ABC board?

A. Somewhat, yes.

Q. Could you tell us about when that might have been discussed by the board?

A. I can't. In the light of all the things that have happened since then my memory on that is pretty vague.

Q. Was it before or after February '65?

A. I think it was before February '65 if I remember right.

Q. When was this discussed by the board, sir? Will you tell us why this became a matter of concern, why this was [2410] the subject of discussion?

A. Mr. Goldenson reported on a meeting he had had with Mr. Symond at which I was not present.

Q. When was that?

A. My memory on this thing is gone, it is forgotten.

Q. Was it before January '65 or around that time?

A. I would guess this is before January '65. Well, the indications were that Mr. Symond was going to move in and move in strongly.

There was some concern about that.

Q. If you recall, sir, what was the subject of the concern?

A. The concern was, I believe, basically his first proposition was to merge McCalls into ABC or his hope of doing that kind of thing. We didn't think that we were interested in it.

Q. Did he want representation on the board?

A. Not for himself, but for a nominee.

Q. What was the board's reaction to this possibility when it was discussed?

A. A very negative one.

Q. Was this subject discussed at the December 7, 1965 meeting?

A. Only in relation to the instability of our stock and the vulnerability of the company with relatively few shares [2411] outstanding.

Q. Vulnerability to a take-over of some kind?

A. A raid if you want to term it as such and I don't want to be sued for libel and coupled with a dip in earnings, bad ratings or something, the possibility of their moving in.

We did know because of the relatively few shares we had outstanding that we were more susceptible to volatile reactions in our stock than our competitors.

Q. I understand. But there are two different subjects. I take it volatile reactions in a stock——

A. Might be a reason for somebody to move in.

Q. I can't quite follow that. Volatile reaction to the stock, you mean you are concerned about the stock going down?

A. Going down to a price where somebody might think you know, I can get into here very cheap.

Q. In a good business?

A. In a good business very cheap, and I am proud of ABC, without consulting us, and forcing themselves on us.

\* \* \* \* \*

[2431] \* \* \* \* \*

Q. I have a question about the indication further down there of estimated new commitments required under broadcast program rights which is a sum that comes to \$40 million?

A. Yes, sir.

Q. I believe the notes indicate that this is replenishing the inventory of feature films?

A. Yes, sir.

Q. What is the basis of the estimate?

A. I will have to admit stupidity. So far this year we have already committed.

Q. Can you tell me how many films we are talking about?

A. As I say we underestimated this.

Q. What is your present inventory of feature films?

A. We have 131 films for which I think we have contracted for \$95 million.

Q. When did you contract?

A. That is over a period of time, one year, two years.

[2432] Q. How many do you plan to buy this year, sir?

A. That depends on the prices. It depends on the availability of motion pictures. I would like to tell you what we have done



in the first four months to show you how stupid I really am. We have now committed ourselves, we bought a package from Paramount Pictures.

We have also bought a package from Seven Arts and then we made one deal for one individual picture, "55 Days to Peking." We have already committed ourselves for \$36 million of which \$9 million is in cash in '67 and the balance within two years.

So, in four months I am at the end of the \$40 million. How can you be so stupid.

Q. How many films were involved in this package?

A. I believe it was about 37 features.

Q. How many pictures became available each year for bidding, sir?

A. Unfortunately it does not work that way. Some of them hold back and then they will release a big block. If I may I would like to tell you what has been going on in this field.

It will give you some indication probably better than I can answer.

This is the United Artist proxy statement. This is one of the best kept secrets in the industry. This is the only official thing I have on it. Shall I read it or tell you what [2433] it says?

Q. Could you identify it for me?

A. Yes, this is the proxy statement of United Artists which was very recently issued, April 10th it says.

Q. Notice of annual meeting.

A. No, notice of merger with Trans-America Corporation. It says:

In January 1967 United Artist entered into a licensing agreement with National Broadcasting Company for restricted network TV runs of 94 motion pictures certain of which have been perviously shown on network television. The agreement includes a series of release dates pursuant to which a limited number of motion pictures are made available for telecast in each of nine years starting September '67-August '68. The license fees payable to United Artist over a period of years total \$115 million which will be subject on an

individual picture basis to distribution expenses, reimbursement of unrecouped investments and so on.

Also, CBS purchased——

Q. And the general pattern is that you pay some percentage, you indicated before about 25 percent down, 9 out of 36.

A. And it is getting rougher all the time.

Q. What I don't understand about the rate with which the potential inventory—I didn't understand your remark before about the rate at which the potential inventory is [2434] becoming available. I understand it is not released in dribs and drabs; it is released in package.

A. Right.

Q. There was something in the record that indicated maybe there was 100 films a year that were being produced that are potential TV fare?

A. Yes, which may not reach TV for four or five years. The bigger the picture the later the delay. The point I am trying to make is that in estimating the 40 and the 30 and the two are interrelated, that I projected——

Q. What is the 30, sir?

A. That is the investment in motion picture productions, participation in motion pictures so that we have some reasonable chance of getting the pictures when they are released. All I did was project that our inventory position at the end of 1970 would be no better or no worse than it is at the end of '66.

We have an inventory of \$95 million now. We will amortize some \$62 million of that inventory over this period which brings us down to about \$32 or \$33 million. I project we will get back up to the \$100 million. That if we are in this business at least that is the minimum we should be at.

From a practical standpoint this is far underestimated.

Q. Is there any way of predicting how important feature films will be four years from now?

[2435] A. Our competitors believe they will be very important, both CBS and NBC.

Q. Who began by putting feature films on during prime time, sir?

A. I believe it was NBC.

Q. Who began putting them on two nights away?

A. I can't tell you which came first, CBS or NBC but both of them did it before we did. Then we had to follow.

Q. You could not counterprogram with something else?

A. You would get slaughtered and the sponsors would prefer to go to a production where maybe \$5 million or \$10 million had been invested in the original production and had that kind of production value rather than go with some new show that was being produced for \$150,000.

Q. What have you tried against feature films?

A. We tried everything on Wednesday night that we had and we got slaughtered. If we are going to be competitive we have to be competitive.

Q. Is Batman on against a feature film?

A. No, sir, it is on 7:30. Host feature films start at nine.

Q. You are not putting on feature films against feature films, are you, sir?

A. No, sir, none of the three networks is.

Q. How do you work it?

[2436] A. We have Sunday night and Wednesday night. Since we came in last, we didn't have any great choice of nights.

Q. You didn't move to program a feature film against a feature film for the coming year?

A. No. Our package is not that strong that we can afford to do that.

Q. How do you know in advance of the year what nights they are going to pick?

A. You know, we all deal with the same agencies, the same sponsors, and that kind of thing gets around, what the offerings are by each network. You find out pretty quickly. They may fool you once in a while.

Q. Do you have any idea how many feature films are indicated to be as a result of your investment in production during this period, \$30 million investment?

A. As I say the \$30 million really was the balancing figure. If we can't buy them or match the cash price of the other networks we ought to get involved in the production and put something into production.

\* \* \* \* \*

[2453] \* \* \* \*

Q. Mr. Siegel, I believe you are probably familiar with the statement made at the September hearing by Mr. Goldenson which went as follows:

Under our Metropolitan Loan where we have borrowed \$70 million, it provides that we have a limitation of 50 percent of our assets as the outside limit of our borrowing.

A. I am familiar with it, yes, sir.

Q. Was that a correct statement, sir, when that was made?

A. I think the intent of the statement was correct, to show that we had a limit on our borrowing power. I think the wording was incorrect. Actually, that was not in the agreement.

Q. In other words, the agreement did not provide a 50 percent debt limit ratio?

A. May I add this? We discussed this with our attorney when we got back. I knew when he made the statement that he had overstated our borrowing power. But the attorney felt [2454] that since he had overstated our borrowing power, that he had done no harm and it was not necessary to correct the record. Had he understated it, they would have corrected the hearing.

Q. You were present in the hearing room when he made the statement?

A. I later informed him and our attorneys have it.

Q. Have what?

A. That the statement he made was technically correct but the wording was wrong.

Q. Technically incorrect—let us decide which it is. The statement he made was that the Metropolitan Loan agreement provided something?

A. That is right. That statement was incorrect.

Q. And you stated there thereafter you informed Mr. Goldenson of that fact.

A. I informed our attorneys.

Q. Did you inform Mr. Goldenson of the fact it was not in the Metropolitan Loan agreement?

A. I did.

Q. When was that, sir?

A. Very shortly thereafter.

Q. The same day or the next day?

A. I can't really be sure it was the same day. It was shortly after that.

Q. And you say you consulted your lawyer?

[2455] A. I talked to our attorney.

Q. Who is that?

A. I talked to Mr. Ehrlick and I think he talked to our outside counsel.

Q. As a result of that conversation, it was decided that—after that conversation, no communication was made to the Commission with regard to this subject?

A. For the reason I mentioned, yes.

Q. The reason was what, sir?

A. The question was how much was ABC's in effect borrowing power.

Q. I don't want to get into what the record was. There was no question, sir. He just made a statement which he interjected in the midst of Mr. Geneen's testimony, without going all through the transcript that is the way it went out.

A. I won't argue but I don't remember it that way. Anyhow, the purpose of his making the statement was to show how much ABC might possibly borrow. Since he overstated the amount that we might possibly borrow that no harm had been done.

Q. On what basis did you believe at that time that he overstated the amount you might possibly borrow?

A. Because it wasn't, as you put it, in the agreement.

Q. There was one error, sir, as we have established, that he said that was in the agreement?

[2456] A. Right.

Q. Now, you are suggesting despite the fact it wasn't in the agreement, the amount of borrowing which he allowed for by reference to the agreement was more than you actually had?

A. Than we could get.

Q. What was the basis for your belief at that time that the amount which he allowed for was more than you could obtain?

A. Because we went back and computed it on that very same day and our maximum borrowing power on the day he made the statement was three and a half million dollars.

Q. I am not trying to discuss or get involved in a computation of 50 percent, but what I am trying to figure out is the basis on which you believed in September of 1966 at the time of the hearing, or shortly thereafter, that your company was limited by a 50 percent debt to asset ratio?

A. You are asking how the 50 percent came about?

[2457] Q. Right.

A. If I can cut through and understand it my own way, it was based on a conversation I had with Mr. Charbonnier of Metropolitan Life. It was not meant to either limit or extend our ability to borrow.

I interpreted it as a warning. It happened that around the middle of August when I called them on the \$25 million bank loan that we had negotiated with the banks, told them we were all set on it, and how did he want to proceed from there, did he want me to come down and discuss it with him or did he want the attorneys to handle it.

He said he preferred to let our attorneys handle it directly and he would get in and go over the documents when they were through. Then he asked me for the details and terms of the loan. I told him.

He said just a minute. He said as far as I can figure out this puts you about 47 percent of your borrowing power.

I said I haven't checked the figure but if you say so that is probably about right. He said I want you to know that not even the top companies are ever given more than 50 percent, which I took to be a warning that we were getting pretty close to the danger line.

I repeated that conversation to Mr. Goldenson incidentally and he did not quite understand it and thought that what they were saying was that 50 percent was our limit.

[2458] Q. That was the basis of Mr. Goldenson's understanding at the time he made the statement?

A. Yes, my reporting to him on the conversation.

Q. You have since learned, have you not, that Mr. Charbonnier has no independent recollection of that conversation although as he put it to us the other day it would have been a logical thing for him to have said?

A. I don't know what he said here the other day, of course.

Q. He had a conversation with you on it.

A. In the conversations I had with Mr. Charbonnier he remembered it and I have had three conversations.

Q. When did you talk to him about this?

A. I talked to him on December 27 in the presence of Jerry Golden who is our general counsel and he had Mr. Fenn who is an attorney for Metropolitan.

We were discussing the Marineland loan. I said incidentally that 50 percent warning you gave me I think was somewhat misused in Washington. I just want you to understand what happened. He listened.

I said you do remember the conversation don't you?

He said, "Yes, I do."

Q. Is the conversation you are now describing a conversation in Mr. Charbonnier's personal presence?

A. In his presence, in his office, with his attorney [2459] there.

Q. On what occasion did you discuss it with him?

A. I had him talk with him right immediately prior to the ITT loan.

Q. When was that?

A. Which would be somewhere and I can't tell you the exact date of the conversation but it would have to be again between January 18 and February 17. I wanted to clear the fact that we were considering borrowing money from ITT to him; he listened to the terms of the thing and he said what happens if the merger doesn't go through and you can't pay it back.

I said, I would like to talk to you at that time. I am not saying these are his exact words but he said something to the effect that, "I think that I have pretty well warned you that you have reached the end. I am telling you that you will have to either refinance this if the merger doesn't go through with equity se-



curities or with subordinated loan from somebody else," in effect indicating there would be no point in discussing it further with him.

[2469]

CROSS-EXAMINATION

By Mr. FITZPATRICK:

Q. Sir you have made reference to the efforts that ABC has made to develop and build up its prime time programming. Now that has been done over the years has it not by virtue of innovations in programming on the part of ABC?

A. Partly by any which required innovation. But I would have to answer yes to your question.

Q. ABC has had the reputation over the last five years as the innovator in television network programming.

A. Which was really forced upon us as I say but we did it.

Q. You did it?

A. Yes, sir.

Q. You said you went daytime network television in 1958?

A. In the fall of 1958.

Q. When did you first go from 10 to 12 noon?

A. We started with a rather limited number of hours. As our ability to program more, to withstand the loss more, grew we expanded our hours. That has been a continual progress from 1958.

Q. In 1958 you did not go straight to 10 to 12?

A. No, sir.

Q. When did you go from 10 to 12?

[2470] A. No.

Q. You don't remember what season that was?

A. No, I don't.

[2478]

Q. Was this meeting in February 1965 at a time somewhat subsequent to Mr. Symond's indication that he wanted to have a member on the board?

A. It was a lot subsequent to that time, yes.

Q. When did Mr. Symond indicate to Mr. Goldenson and yourselves that he would like to have a member on the board?

A. He never indicated to me. I wasn't at that meeting. I believe it was the latter part of '63 or thereabouts.

Q. Was this a request, a one-time request or was that a request by Mr. Symond?

A. I can't answer the question of my own knowledge.

Q. Did Mr. Goldenson keep you abreast of what was going on with respect to Mr. Symond?

A. Generally, yes.

Q. Did he report to you in conversations that Mr. Symond's request for a member of the board was made on more than one occasion?

A. Yes, I believe that was a fact.

Q. That was a continuing request, was it not, over a period of time?

A. Relying on the knowledge of a conversation that somebody had with somebody else, yes, that is true.

Q. There came a time when the board did away with [2479] cumulative voting that stockholders were asked and voted in favor of doing away with cumulative voting for directors of ABC, is that correct

A. Yes. I believe that was in 1964.

Q. Was that the result of the importuning of Mr. Symonds to have a member on the board of directors?

A. And one other group.

Q. Who was that?

A. Combination of the Putnam and Openheimer fund that also asked for a representative on the board.

Q. Now, did you have any discussions with Mr. Goldenson as to the proffer by Mr. Symonds to merge McCalls with ABC?

A. There was no discussion. There was a discussion with the board, not with me personally. The board was very negative and didn't even want to consider it.

Q. When was that reported to the board?

A. I just can't give you those kinds of dates. I just don't keep them in my mind.

Q. Was it 1964?

A. It would be either '63 or '64.

I just don't know.

[2489] A. The Lawrence Welk Show. I am not sure it was completed at that time.

Q. You were at least getting all the cost figures?

A. That is right.

Q. You were getting some bills?

A. That is right.

Q. So that by November '65 you had a general idea as to whether or not your earlier general estimates were completely out of line, is that right?

A. That is right.

Q. What did you discover?

A. That the costs were going to be much higher. If I may, the thing that I discovered that I didn't know at the beginning of '65 was the acceleration of color during '65.

I believe it was in the middle of the year, around July that Mr. Goldenson called me into his office and he had a GE television set on his desk in color, a \$200 set. He said, I had always said that when they could get the price of sets down to \$200 a set that color was going to come and come very, very quickly.

It was actually not the cost as moving ahead the timetable that suddenly collapsed on us that we had to do this and do it quickly rather than we had thought over a period of years.

[2490] Q. By July of 1965, NBC had pioneered quite a bit in color, had they not?

A. They were practically all in color for some time.

Q. You knew that color was coming, it was just a question of when it was going to come to ABC, is that right?

A. When it was going to come to the industry, yes.

[2491] Q. Let us talk about prior to Mr. Goldenson calling you in and showing you the \$200 GE color set. Let us talk about a month or two before that. What were the plans of ABC in June, 1965, let us say, with respect to the time schedule on colorizing ABC Network?

A. To do it over a period of years.

Q. What was the period of years that you contemplated doing it at that time?

A. We really didn't have a time table but we would have apportioned it out with our ability to pay for it.

Q. You would absorb it as you went along on the basis of your cash?

A. One at a time and on the basis of our cash and cash requirements and so on.

Q. In July, 1965, as a result of the conversation with Mr. Goldenson was any decision reached by ABC to accelerate its colorization program?

A. As I told you in the middle of July we felt we had to accelerate.

Q. What did you do to execute this acceleration at that time, if anything?

A. We moved ahead and committed ourselves actually to a lot more than we would have.

Q. When did you start making these commitments?

A. The latter part of 1965 and up to today, in 1966. [2492] In 1965 we spent an awful lot of money, more than we had ever spent in capital expenditures before.

Q. In June, 1965, you had no fixed time schedule as to when you would go completely in color?

A. That is right.

Q. You apparently had some ideas to go color with Hollywood Palace. You must have had a time schedule on that?

A. Yes.

Q. When was that?

A. Actually, the first year we had four hours in color in total on the network.

Q. What year?

A. 1964-1965. We had planned, I believe, half of our programming including film which, of course, we don't have to colorize. About half of our programming in color in the fall of 1965 to 1966.

Q. Is that half of the prime time?

A. Half of the prime time.

Q. You did not mean your whole schedule?

A. No, sir. Thank you for correcting me.

Q. In order to meet that schedule that you had set for yourself of half of your prime time for the 1965-1966 fall season—am I stating it correctly?

A. Yes.

Q. What studios did you have to colorize in order to [2493] accomplish this?

A. The only ones we colorized were the two out on the West Coast where we have two live shows. We have been able to utilize the Colonial to some extent by backing up a remote truck and treating it as a remote pickup. I think that one of our trucks may have been somewhat equipped for color. I can't be sure that it was at that time or a little later.

Q. Was Jimmy Dean in color?

A. I don't believe so.

Q. Now, you made your plans for the 1965-1966 fall season. Of course you had to make them well in advance of the fall of 1965. There came a time in the summer of 1965 when by virtue of this GE TV set ABC made some decision to accelerate their colorization of the network; would that be a true statement?

A. The true statement is that the other networks were going to be all in color and we had to be also.

Q. Had CBS made an announcement by July, 1965 as to their color plans?

A. I can't tell you whether they had made it by then or not.

Q. Was CBS moving ahead of you in the colorization program?

A. Yes, sir.

Q. So that your plans when you had no fixed time [2494] schedule started to vary not only on the basis of what the color set sales price might be but also on the basis of what CBS was going to do?

A. Competitive factors.

Q. As a result of the CBS color program schedule and the set manufacture advancements that were being made, did you

actually accelerate your colorization program sometime in the summer of 1965?

A. I think we did to some extent.

Q. How did you effectuate that speed up or acceleration, whichever you like to use? What did you do to carry it out? Did you give Mr. Barnathan some orders?

A. I think he was moving as rapidly as he could. We started talking about a colorization of one studio in each of our five stations. I think originally and you are getting me into engineering which I know nothing about, color chains so that our stations could project.

Q. I am only asking you for whatever knowledge you could acquire in order to make the decisions you had to make at ABC. You had to acquire some knowledge?

A. Yes. I have given you a few in a general way. If you get me down to specifics you will lose me.

[2495]

Q. If I can just backtrack for one second, following the February meetings with Mr. Geneen, did those meetings terminate abruptly or was it just understood that you would forego further negotiations for a time?

A. I think I said this morning and I can only talk to my own knowledge but I was no longer involved from February to November. Though I was sure that, and I know there were emissaries between Mr. Geneen and Mr. Goldenson and I mentioned some of the names this morning. So I can't [2496] say it terminated abruptly because I think there was some contact but I was not a party to it.

Q. You were not the point of contact?

A. Exactly.

Q. But the body was kept warm?

A. Yes.

Q. It was on the back burner keeping warm?

A. Right.

Q. In November, 1965, it was moved up from the back burner to the front burner again, was it not?

A. Yes, it was.

Q. And negotiations became a little more realistic and a little more determined?

A. Serious.

Q. Serious is the word I am looking for. Thank you.

A. Right.

[2574]

Q. Now, sir, with respect to the aspect of your duties as to special events and documentaries and public affairs, am I correct in understanding that Mr. Lower's division comes up with recommendations and proposals for what will be done in the area of special events for the next television season?

A. They come up at the beginning of the season, not necessarily without lines at the beginning of the season, but they request the approval to do so many documentaries, and so much in the way of special events, and news coverage, or election and convention coverage and that sort of thing.

At that time they don't come up with the individual names of the documentaries.

Q. But does there come a time when there comes before the executive committee or the Board itself various proposals on the part of Mr. Lower's office for special event programs?

[2575] A. No, sir, never.

Q. Where is approval made—let me pursue that—doesn't Mr. Lower's office have to have a budget approval for the proposed programs?

A. The budget is approved at the beginning of the year, in a lump sum.

Q. ABC does not know what documentaries, and special event programs they are going to have and they just allocate a specific sum.

A. Yes, and I believe at that time Mr. Lower doesn't know exactly what the documentaries will be for the coming year.

CHIEF HEARING EXAMINER. That gratuitous statement will give rise to a half an hour of interrogation. You can answer it categorically, yes or no, and I am sure that is all Mr. Fitzpatrick wants.



By Mr. FITZPATRICK:

Q. What comes before the Board with respect to budgetary matters on Mr. Lower's division? Is it just once a year they come before the Board?

A. They come before the Board to go with a lot of other things, about once a year, when we project for the Board what we are going to do in all of these various fields. So that once a year, yes, it would come before the Board. That is from a knowledge standpoint.

[2576] Q. Is there an 18 month's lead time on special events and documentaries?

A. On some I imagine there would be. I can't answer that.

Q. Now, there has been received in evidence as AR-46, Attachment D. Do you have that, Mr. Bergson?

Mr. BERGSON. I have it here.

By Mr. FITZPATRICK:

Q. Do you have it in front of you, sir?

A. Yes, sir.

Q. That is a public release specifying some of the 27 hour length documentary specials that were going to be put on by ABC in the future.

Now, before we reach the point which is culminated in the March 27 PR release of 1967, did not certain things have to come before the executive committee with respect to budgeting on various special events and documentary programs?

A. No, sir.

Q. Do you recall whether or not the executive committee minutes reflect a budgetary item for having a special on Africa?

A. Africa was an unusual item. It is about the only one, or if they are getting into anything that is above their budget, which Africa was, this is a show which is going to be on for three hours or so, that would come to the board. But this was [2577] not part of their regular budget.

Q. So that within any given year, if special events and documentaries require expending money more than allocated at the beginning of the year, they have to come back to the board?

A. It depends on the size of the amount we are talking about. This was an unusual item that you are talking about.

Q. Well, tell me, let us assume with me, if you will, Mr. Siegel, that special events, Mr. Lower's division, has already appropriated all of the money for the whole year, and they would like to do a special events program on Puerto Rico.

Before he can even undertake that, he has to come before the board?

A. No, sir, he would have to come to me, and not the board.

Q. He would come to you first?

A. That is right.

Q. And you would want to know how much it was going to cost and how much they had figured out the expense was?

A. In principal, and in general, yes.

Q. And let us say that he says he is going to cost us one million and a half dollars, does that go to the board?

A. That much I would want to take to the board. I would not want to take that on myself.

Q. Let us say he was a little more conservative, and he [2578] said one million dollars, would that go to the board?

A. Yes, I think that one million dollars, I would take to the board also.

Q. What if he was in a real good mood one day and he had a half a million dollar project, would you take that to the board?

A. If it was within the range of his regular price of documentaries, I might take it on myself to extend his budget somewhat.

CHIEF HEARING EXAMINER. And, Mr. Siegel, is there a cut off policy there?

The WITNESS: No, sir.

[2597]

#### Testimony of John J. Graham

By Mr. GORDON:

Q. And what is your present employment?

A. Vice president of General Dynamics Corporation, group executive, electronic industrial products.

Q. What was your employment before going to work with General Dynamics?

A. I was president of Wright Aeronautical Division, Curtis-Wright.

Q. And prior to that time, did you have a position with ITT?

A. I did.

Q. What position did you have and please try to tell us what time periods that covered?

A. Well, I went to ITT in December of 1961 and left in mid-1964. I went in originally as executive assistant [2598] to Harold Geneen, president.

In the spring I was promoted to head the commercial group, and later in the year I was made North American area general manager. I joined the company as a corporate officer, vice president. I was responsible for all of the non-communication operating companies in the United States and Canada, plus the international division, that is the import-export products from the United States, and the acquisition activities.

Q. And were you a director of the company as well?

A. I was.

Q. During what year or years were you a director?

A. I believe I was elected probably early in 1963. I remained a director until I resigned in June of 1964.

Q. Do you know a Mr. Gladen Baker?

A. I do.

Q. Who was that gentleman, can you tell us?

A. He was the financial officer for Travelers Insurance Company in Hartford, Connecticut.

Q. Did you have any discussions with Mr. Baker?

A. I did.

Q. Can you tell us the nature of those discussions and the subject matter covered, and where they took place and when they took place?

A. The time was sometime prior to October of 1963. [2599] I would guess late August or early September, or somewhere in there. I have no notes on the period and so I am simply reading from memory.

Mr. Geneen and I went to Hartford and met with Mr. Baker and visited the Hartford television station, WTIC, and while we were there Mr. Geneen made an offer for the station.

Q. And do you recall about the terms of what that offer was?

A. \$35 million, with the final terms to be worked out. I don't remember how we finally came out on it. It was a combination of common and preferred, I believe was the final package, but the basic price of the station was \$35 million.

Q. Did you meet with Mr. Baker on more than one occasion?

A. Yes. I met with him probably on at least two occasions in New York City.

Q. Was Mr. Geneen present at those meetings as well?

A. I think we talked to Hal in his office both times, but we were tying up all of the details of the station and coming up with a final offer, so that Hal was not the full time participant in the meetings.

Q. Do you recall what was the final outcome of the negotiations for the possible acquisition of WTIC?

A. In October of 1963, I made a presentation at the board meeting in Berlin, Germany, in which I strongly advocated [2600] that we get in the television operating business and discussed the particular station we had in mind. I don't recall just what the mechanisms were, but the final result was that some of the board members thought the price was too high and it was dropped.

Mr. COHN. I didn't get your last word.

The WITNESS. Some of the members felt that the price of \$35 million was too high for the station and the matter was dropped.

By Mr. GORDON:

Q. Now, did you know a gentleman by the name of Harold Gross?

A. I did.

Q. And did you have any conversations with Mr. Gross?

A. Yes, on probably two or three occasions in New York City.

Q. Could you tell us what year this was?

A. This, again, was in the fall or early winter of 1963, and it was in the same period. It was shortly after we started talking with WTIC, probably within the month or two months after the first conversation with WTIC.

Q. And was anyone else present during your discussions with Mr. Gross?

A. We introduced Mr. Gross to Mr. Geneen. Most of the conversations were between Stanley Luke and myself or Stanley [2601] Luke and Mr. Gross.

Q. And what was the nature of your discussions with Mr. Gross?

A. Well, we initially were interested in the station and it looked to us like an excellent property.

Q. Excuse me. Can you tell us what station?

A. WJIM, I believe was the call letters.

Q. This is Lansing, Michigan?

A. Yes, Lansing or Flint.

Q. Lansing, I believe it was.

A. Yes, Lansing.

Q. Will you continue, please?

A. We were interested in the station and talked to him, first of all, about his willingness to sell the station to ITT. We then became interested in Mr. Gross himself, who as many people in the broadcasting industry know; is an excellent operator in total field. We discussed with him the possibility that if he came with ITT, with the station, and we put together a chain of stations, that he might well be interested in being manager. There was never any conclusive agreement. There was discussions with Mr. Gross.

Q. Was Mr. Luke at that time under your supervision?

A. Mr. Luke reported directly to me, and in fact I put him in the job when I created the acquisition group.

[2602] Q. And did you give Mr. Luke any instructions about a journey that he should make to see Mr. Gross?

A. Not specifically, but on any acquisition that we looked at, Stanley or someone that he would delegate would go out and inspect the operation. I don't recall telling him to go.

Q. Well, Mr. Luke testified, I believe, that he did go out and talk to Mr. Gross.

A. That is correct, but I don't know whether that was part of his job.

Q. Did he report back to you after his discussion with Mr. Gross?

A. Yes, he did.

Q. Did there come a time in early 1964 when some of your duties for ITT changed?

A. Yes, around the end of 1963, Mr. Geneen transferred the acquisition function from my operation to Hart Perry.

Q. And then after that time, do you know what happened to the discussions and negotiations with Gross for the purchase of WJIM?

A. No, it kind of slipped out of my ken and I believe it died of old age or——

Mr. BERGSON. I move to strike the last part.

Mr. GORDON. I am perfectly willing to let the answer be stricken after "No, I think it was beyond my ken," and I [2603] think that was responsive.

CHIEF HEARING EXAMINER. All right.

By Mr. GORDON:

Q. Did you have discussions with Mr. Geneen from time to time as to ITT's getting into the broadcasting business?

A. I did. I first advanced the idea of ITT getting in the broadcast business and it was my intent. The approach I took with Geneen was that we should not only buy a station, but continue to buy the legal limit of five VHF and seven radio.

Q. Excuse me, are you finished?

A. Later on we had some talks about the possibility of UHF also, or we would have been permitted to buy two.

Q. What was Mr. Geneen's reaction to your ideas in this connection?

A. Very favorable.

Q. And in connection with UHF, did you have any studios undertaken by ITT?

A. Yes, I had a man named Ralph Vanhorn who was doing market research and market planning for me, and I had him make a check of the open UHF cities, where construction permits might be obtained.

Q. Did he make such a study?

A. He did make such a study, yes.

Q. And what is your best estimate of what year this [2604] study was made?

A. Well, it would have to be 1963. It was about in the same period. We were taking a general look at the TV and radio area. So it would have to be in the same period. I ceased to be interested, as I said before, at the end of the year. I don't mean interested, but I was not responsible for the operation.

Q. Had you before coming to work for ITT been employed at another company?

A. I worked for RCA for 14 years, yes.

Q. And does this account for your interest and knowledge of the broadcasting?

A. Yes, I was involved in the whole field of communications and particularly broadcast, and hence the interest.

Mr. GORDON. I call upon ITT to produce a copy of the Ralph Vanhorn report. This is not the first time we have asked for material of this nature. I will introduce in the record, tomorrow, and I don't have it available now, a request that the Department of Justice made to ITT in November or December of 1966, asking for all documents in their possession having to do with possible entry by ITT into the broadcasting field, whether networks or stations. So this document should have been produced and I call again for its production, sir.

CHIEF HEARING EXAMINER. Could you describe it with particularity?

[2605] Mr. GORDON. It is the document the witness last testified, the Ralph Vanhorn report about UHF availability and opportunities in the United States, prepared in 1963.

CHIEF HEARING EXAMINER. Can that be furnished?

Mr. WHIPPLE. May I make a statement? I am advised that we have produced everything that was in the company's files, in response to Mr. Gordon's letter which he referred to. We will make a specific check, however, for this report.

CHIEF HEARING EXAMINER. If you would.

Mr. GORDON. Obviously that was not done, sir.

The WITNESS. Could I say something? This was not a very voluminous or, let us say, sophisticated report. It was in the nature of sort of a rough draft to me, and I don't know that you



will find a book or something, but Ralph did make such a report to me, but it may be in the form of a letter or something like that.

[2609]

Q. Can you explain to us from your knowledge and experience of the way ITT operated while you were there, the degree of inter-reaction between the wholly owned subsidiaries and their line activities on the one hand, with the ITT top management and staff people on the other hand?

A. Well, ITT operated at that time pretty much in the conventional line and staff relationships, such as RCA, and GE, and Westinghouse and so forth. There were a couple of subtle differences in that the staff side of the house was a much more powerful group than it normally is in a company like GE, for instance.

I don't mean powerful in an offensive sense, but I mean that the staff people sat in the general management meetings, for instance, and were rather on a par with the operating people in major discussions. This is one of the differences I mentioned.

Most companies, staff is primarily a service to line officers and it doesn't assume quite the same equality of relationship.

The other kind of subtle difference is that the divisional comptrollers report back to New York to the comptroller in New York on a line basis, which keeps a pretty firm financial control at the central headquarters. Insofar [2610] as operation of divisions, the company work this way: We put together what is called a delegation of authority, and this was put in while I was there. First, we took the companies and split them down into three major groups.

[2617]

By Mr. FITZPATRICK:

Q. Mr. Graham, at the October '63 Board of Directors meeting held in Berlin, what position, if any, was taken by Mr. Geneen with respect to the acquisition proposal of WTIC-TV?

A. You are asking me to go back about three years but I believe at the Board he expressed strong backing on the situa-

tion at the time. The idea of being in the television business, I don't recall if there was any vote at that Board on whether they should do it or not.

Again my memory does not cover that but I would guess that was an executive committee meeting discussion.

Q. Sir, I show you what has been received in evidence as J-139, a draft agreement between ITT and Travelers.

A. Right.

Q. Was that draft agreement ever made available to Travelers for their signature?

[2618] A. I think it was only shown to them if I remember correctly just for review. I don't think we ever went through a signing ceremony at all, if I remember correctly.

Mr. WHIPPLE. I did not get the answer.

The WITNESS. I said we only showed it to them as a draft. I don't recall any official signing ceremony or anything. I don't think there was.

By Mr. FITZPATRICK:

Q. Does this document J-139 represent the proposition that ITT made to Travelers?

A. I would have to say it looks like it. I couldn't tell you from this distance whether it does or not.

Q. If you read it could you tell us?

A. I doubt it. It looks very much like it but I couldn't swear it is the same document. It looks very much like it.

Q. You made reference to talking to Mr. Gross about the possibility of his managing a chain of stations?

A. Right.

Q. Was that a chain of television stations?

A. Television and radio.

Q. Had Mr. Geneen authorized you to talk to Mr. Gross with respect to this possible management arrangement with Mr. Gross?

A. Well, there never was any—I am trying to make [2619] clear there was never any offer to Mr. Gross. There was a discussion with him. I am pretty certain we talked to Geneen about it before we talked to Gross.

Q. Is that your best recollection?

A. Yes.

Q. Do you recall what Mr. Geneen's reaction was?

A. As I recall it was favorable. Of course, you understand it was in an exploratory phase. We were not making commitments to the man or anything like that.

Q. I understand. What was the status of the Gross negotiations at the time the acquisitions functions were transferred from your department? Do you recall?

A. No, I don't.

I lost track of that after we talked about a price to him. I think that was toward the end of the year if I remember correctly. I don't know what happened to him.

Q. To the best of your recollection who was it that initiated the idea of ITT acquiring a series of television stations?

A. I did.

Q. You made this recommendation to Mr. Geneen?

A. Yes.

Q. Did you recommend that you acquire five "vis"?

A. I did.

Q. Did Mr. Geneen give you any authorization to try to [2620] reach that limit or any encouragement?

A. There was nothing written but certainly we would not have proceeded down the road without his blessing.

Q. When was it that you and Mr. Geneen discussed this possibility of ITT acquiring VHF stations?

A. Probably mid-year 1963.

Q. Mid-1963?

A. Somewhere in there. You are asking me to strain my memory. Really I don't have notes on this or anything.

Q. With reference let us say to the Travelers negotiation?

A. It was before that. I probably even, when I first went there, spoke of the possibility someday of doing something like this. As I say I came out of a company which was very successful in it.

But I have no point in time when I sat down with Geneen and said let us do this.

Q. Now with respect to the CATV, the extent to which you participated in that, while you still had some authority over that proposal, did you develop the service financing package theory?

A. No. Could you tell me just what you mean by service financing first?

Q. Having the Kellogg Company finance the CATV system and having Federal do the actual construction.

[2621] A. The idea of financing—you see, we operated with Kellogg credit which financed the people, the independent companies, in the telephone business. It was out of this that Joe Posifissil who was Treasurer of Kellogg came out of it with the thought of financing the V's.

The FCC thing was a later development.

Mr. FITZPATRICK. I have no further questions.

CHIEF HEARING EXAMINER. Mr. Bergson.

Mr. BERGSON. No questions.

CHIEF HEARING EXAMINER. Mr. Cohn.

By Mr. COHN:

Q. Mr. Graham, first of all on this VanHorn study of 1963, I gather from what you say, correct me if I am wrong, it was some kind of informal piece of paper?

A. Yes.

Q. Perhaps some handwriting or loosely drawn?

A. It was not a sophisticated document. It could have been a draft, a typed draft or something of this sort. I doubt if it was pencil written but it was not a formal study such as one would make on an acquisition thing. It was a review of possibilities and something to look into.

Q. So when you used the word study you did not mean it in the formal sense that study is used when an organization has one of the management groups prepare something, digesting or putting together material.

[2622] Mr. GORDON. What is the normal meaning of a study, sir. It is a very general word.

CHIEF HEARING EXAMINER. I think the witness' testimony is clear on the point.

The WITNESS. Perhaps I could answer.

CHIEF HEARING EXAMINER. Very well.

The WITNESS. I would qualify it as a cursory study. I think that is the way I would put it. It is not a study in depth.

By Mr. COHN:

Q. Do you recall how many pages it was?

A. No, I don't.

Q. Do I understand that you introduced Mr. Gross to Mr. Geneen?

A. Yes.

Q. How long did the introduction last?

A. What do you mean?

Q. I am serious, Mr. Graham. Was it one of those things, "Mr. Gross. I would like you to meet Mr. Geneen. Hello, how are you," and that is that.

A. Mr. Geneen is probably one of the world's great salesmen. He always took acquisition prospect people like this into his office to get a tremendous impression of his company. I would guess we took him in and talked to him for a half hour or something like that. This was our normal practice.

[2623] Q. Do you know when this occurred approximately?

A. I think that was probably late fall or early winter or somewhere in there.

Q. What year?

A. 1963.

Q. Who was present when this meeting took place?

A. Mr. Luke and I.

Q. Where was the meeting?

A. In New York.

Q. Where in New York?

A. 320 Park Avenue, Mr. Geneen's office.

Q. While you were there at ITT, did you ever apply for construction permits to build VHF or UHF stations or any radio stations, whether AM or FM?

A. Not in the United States, no.

Q. I am only talking about the U.S.

A. Continental U.S. Puerto Rico they did, of course.

Q. Now you testified that at the October 1963 meeting of the Board of Directors held in Berlin, and I use your precise words, I believe, and I am emphasizing the words "I believe," that Mr. Geneen took a position on the WTIC matter.

Is that correct, sir?

A. As I recall he was favorable to it, yes.

Q. But that is a very vague recollection?

A. Not so vague. We wouldn't have gone this far unless [2624] Geneen was quite favorable to it.

Q. He took a favorable position at this Board meeting?

A. To the idea of being in the TV business.

Q. But not on the WTIC matter?

A. As I said, I don't recall a decision on the WTIC matter at the Board meeting. As far as I know there was not. No, I don't recall any vote being taken at the Board meeting. This input came to me later on the price.

Q. Now, Mr. Graham, you said it was you who recommended that ITT acquire five VHF stations in mid-1963.

Will you tell me precisely what ITT or you particularly did affirmatively to find those particular five VHF stations? I am not talking about those situations where the shoe was on the other foot and they came to your attention from a third person.

A. I had Stanley looking at the total market for TV stations along with—that is, what was available. When we were looking at any particular area, for instance we were looking at the wire and cable business, we would take a look at the available companies and so forth.

As I remember, Stan was looking at what was available in the TV and radio business. The Travelers thing actually, as I remember, came to us unsolicited.

Q. It came to you?

A. Yes, as I remember.

[2625-2626] Q. Didn't Gross come to you, also?

A. I think that was a broker. A broker or an investment banker.

Q. A man by the name of Mr. Deutsch?

A. I never met Mr. Deutsch.

Q. In those two instances you did not go out and find those two properties but they came to you from a third person, unsolicited?

Mr. GORDON. He did not say that WTIC came from a third person. He contrasted that with Gross who came from a broker.

By Mr. COHN:

Q. As far as WJIM is concerned, Lansing, Michigan, Gross, that came to you from a third person. Is that correct?

A. You would have to check with Stan Luke for accuracy but I believe it came from a broker or investment banker. Stanley Luke would know.

Q. The name of Deutsch does not refresh your recollection as the person who called it to ITT's attention?

A. No, it doesn't. I don't remember Deutsch. You have to remember that I did not get involved in many of the negotiations that Stanley was working on.

Q. Mr. Graham, I would like to show you what has been received in evidence here, marked as documents J-144, a letter from one Mr. Millard Deutsch to Mr. Geneen, dated February 28, 1962, J-145, a letter from the same Mr. Deutsch to Mr. Geneen [2627] marked personal and confidential, dated May 20, 1963, and then a letter from Mr. Deutsch dated June 21, 1963, addressed to Mr. Stan Luke, each of which refers to either Mr. Gross or an unidentified radio and television station.

Does that refresh your recollection as to the circumstances under which the Gross properties first came to the attention of ITT?

A. No, it does not. As I mentioned when you were looking this up, Stan Luke handled many things that I was not involved directly in.

We received these maybe six or eight a day some days from people who were trying to present, not TV stations but in the general acquisition business.

Q. Six or eight inquiries from people who wanted you to buy their companies?

A. We didn't get six or eight every day, you understand. In fact any large company does. I probably sent that to Stanley but I don't really recall Deutsch at all.



Q. As far as WTIC is concerned, did ITT seek that property out and initiate on its own those conversations for the possible acquisition of it.

A. As I remember the circumstances, Mr. Baker, Gladden Baker, had been a father of a TV station up there at Travelers. He was approaching retirement and they were in a peculiar posture. They did not really want to sell the station in the [2628] sense of putting it up on a block or something. They were looking for some company who would they felt be the proper home for their prize child which they had raised from virtually nothing.

I believe the contact first came through our insurance people. Travelers was handling some of the employees' insurance and so forth. I think it came through that route originally or they could have called Geneen. I know they came to us in the case of WTIC.

Q. You mean Travelers came to you?

A. Yes.

Q. You said you met Mr. Gross on two or three separate occasions.

A. That is right.

Q. Do you recall the times you met him or where?

A. I think I gave you some approximate date.

Q. You gave me as to the first one as I recall when you met with Mr. Geneen. Can you tell me when the other meetings took place or approximately when they took place?

A. I would be guessing if I told you. It was probably within weeks or after that. I would be guessing.

Q. Do you know who was present at these other meetings?

A. He came in to see Stanley Luke actually, then Stan and I got together with him for a while while he was there.

Q. But his primary visitation with ITT was with Mr. Luke [2629] and not with you.

A. That is right.

Q. I want to be sure that your meeting with Mr. Gross was a pleasantry, courtesy, but any real conversations of substance were being carried on with Mr. Luke.

A. I would not say that.

Mr. GORDON. I object to the characterization.

CHIEF HEARING EXAMINER. I don't think it is an unfair question, Mr. Gordon. I will let him answer.

The WITNESS. I was in charge of the operation. I exercised considerable authority over what we did and didn't do. Of course, Mr. Geneen made the final decisions. I didn't meet with people just because I had nothing better to do, no.

By Mr. COHN:

Q. Between you and Mr. Luke, who spent most of the time with Mr. Gross on the visits to New York?

A. Mr. Luke.

Q. Considerable more, is that right?

A. He was working on the details, sure.

Mr. COHN. Thank you, Mr. Graham. Those are all the questions I have.

CHIEF HEARING EXAMINER. Any redirect, Mr. Gordon?

#### REDIRECT EXAMINATION

By Mr. GORDON:

Q. Did Mr. Geneen describe the relationships between ITT [2630] headquarters and subsidiaries and the whole internal structure as the ITT management system?

Mr. COHN. I object, Mr. Examiner.

I assume this goes to the question of what the relationship would be in 1967, '68 and '69 between ITT and ABC. Conversations which went on in '63 and '64 are completely immaterial to any relevant or material issue before the Commission now.

Mr. GORDON. Sir, Mr. Geneen has testified back in September and just a few days ago about how ITT is structured internally. It seems to me that we have very few witnesses who can testify of their own knowledge and experience as to just what their experience has been as part of the ITT management team.

CHIEF HEARING EXAMINER. Mr. Geneen testified as to the present. This witness is going back three or four years.

Mr. GORDON. In September '66 he testified as to the ITT management system. He talked about it as though it was a matter of principle that had been in effect for some time in ITT. After all he came there in 1959.

CHIEF HEARING EXAMINER. I will have to sustain the objection.

Mr. GORDON. The same exceptions?

CHIEF HEARING EXAMINER. Certainly.

Mr. GORDON. No further questions.

CHIEF HEARING EXAMINER. Unless Mr. Fitzpatrick has [?631] something the witness is finally excused.

Mr. FITZPATRICK. I have none.

(Witness excused.)

Mr. FITZPATRICK. May we go off the record.

Whereupon,

HOWARD E. STARK was called as a witness and, after being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. GORDON:

Q. Mr. Stark, please state your full name for the record.

A. My name is Howard E. Stark.

Q. Where do you reside and what is the nature of your business?

A. I reside in New York City and I am a broker specializing in the purchase and sale of television stations and radio stations.

Q. Did there come a time in 1964 when you had some meetings with some ITT officials?

A. Yes, there was.

Q. Whom did you meet with, if you can tell us.

A. I met with Mr. Chris Witting, whom I had known in the broadcasting business and I met with Bob Kenmore. And I met with two or three other people whose names I do not recall but I understand they were market research people. And I met with Mr. Geneen, President of ITT at one time.

[2632] Q. Tell us what you discussed at your meetings with these ITT officials whom you have named.

A. These were separate meetings. I met mostly with Chris Witting and we discussed the expansion of the broadcasting

business since he was in it, up to the present time. He indicated that ITT was interested in exploring the possibility of possibly owning some broadcasting stations.

Q. Was Mr. Kenmore present at some of your discussions with Mr. Witting?

A. Yes, he was.

Q. Were you called by Mr. Witting or did you interject yourself?

A. No, I think I bumped into Witting on the street one day. He said, "Howard, I think we ought to have a talk". I said "I have been meaning to call you", and that is what happened.

CHIEF HEARING EXAMINER. I missed the year.

The WITNESS. I would say the summer of 1964.

CHIEF HEARING EXAMINER. Proceed.

By Mr. GORDON:

Q. Maybe you took me very literally. Did you press your services upon them initially or did they call upon you to do something for them?

A. I called upon them initially. They said that they probably were going to call me because they knew what business [2633] I was in and possibly I knew of some stations that might be available.

Q. Did these ITT officials whom you have mentioned indicate to you the type of TV property they would be interested in?

A. Yes, in a way. Knowing the size of ITT, I knew they would not be interested in small properties.

They were interested at that time to see if I could produce a group of stations on an exchange of stock basis. They felt this might be a way to acquire a group of stations.

Q. By group of stations you mean a group-station owner, I take it?

A. Yes, a group-station owner.

[2634] Q. Have you finished?

A. Yes.

Q. I would like to show you this document which has been marked in evidence as J-208 from Mr. Witting to Mr. Perry dated May 6, 1964 and ask if this might refresh your recol-

lection as to the circumstances of your first meeting with ITT officials?

A. Well, the letter is accurate except I don't remember the 8 to 12 times earnings.

Q. I am just asking about the——

A. Yes, it is a general discussion of the television broadcasting industry.

Q. This indicates, does it not, that it was Mr. Witting that invited you to come to ITT?

A. No.

Mr. COHN. The letter does not indicate any such thing as to who initiated the conversation. Mr. Gordon knows it.

CHIEF HEARING EXAMINER. Objection sustained.

By Mr. GORDON:

Q. Pursuant to this letter, did you then have a meeting with Mr. Witting?

A. Yes, I did.

Q. You have already testified you also met Mr. Kenmore and two other people from ITT's marketing group and on at least one occasion Mr. Geneen?

A. Yes.

[2635] Q. What did you discuss with Mr. Geneen on the occasion you met with him?

A. It was in the evening about this time——

CHIEF HEARING EXAMINER. About this time, sir, could we get the dates as we go along and the approximate time?

THE WITNESS. The date of the meeting was probably in June of 1964, June or July 1964. Mr. Witting wanted me to meet Mr. Geneen. I had expressed an interest in meeting Mr. Geneen. We met in his office for about 15 minutes. I believe he was leaving the country the next morning.

We just had a short meeting in which he indicated that ITT would be interested in exploring the possibility of owning some broadcast stations.

By Mr. GORDON:

Q. Now, did you do anything in that connection about trying to find some group station owners who might be available for sale?

A. Yes, I did.

Q. Tell us what you did, please?

A. I discussed it with—Witting and I had discussed several possibilities. He knew that there was a shortage of television stations that were available; that you just don't buy these things the way you buy a sack of sugar. But I had very good contacts with some of the multiple station group owners and it might be at that time if ITT would agree [2636] to the possibility of tax-free exchange of stock, I thought at any rate it would be worth the try.

Q. So whom did you contact, sir?

A. I contacted Storer Broadcasting.

Q. How did you contact them?

A. I called Mr. George Storer, Senior, at his ranch in Saratoga, Wyoming. That was on June 30, 1964.

Q. How do you recollect that date?

A. I looked it up on my telephone slips.

Q. What was your discussion with Mr. Storer?

A. I informed him that I had had some meetings with ITT and I had their permission to use their name in advising him that they would be interested in exploring the possibility of a merger with Storer Broadcasting.

Mr. Storer said, "Speaking as a stockholder of the company I don't think we are interested but I don't speak for the company. I will have to poll some of my directors to start preliminary conversations."

He telephoned me back two or three days after that and said "ITT is a fine company but we are not interested in selling."

Q. Did you communicate that information to ITT?

A. Yes, I did.

Q. What if anything did you do in connection with other possible group stations owners who might be available for sale?

[2637] A. I talked to Corinthian Broadcasting which was a privately owned company.

Q. Who was the gentleman you spoke to?

A. Reed Petersmeyer, president of Corinthian Broadcasting. I advised him that ITT would be interested in talking to him about a possible exchange of stock. Mr. Petersmeyer said, "Howard, we have nothing to sell. We are not for sale".

This advice was transmitted to Chris Witting. He asked me whether I could arrange a luncheon, that he would want them to be his guest at a luncheon at ITT's offices. I transmitted this to Mr. Petersmeyer.

He said, "We will go out of courtesy to you, Howard, and to Chris Witting whom we know, but we will go with the understanding that we have nothing to sell."

So we arranged a luncheon. Mr. Kenmore was present at the luncheon, Mr. Petersmeyer, Robert Brian, financial vice president of Corinthian Broadcasting, and myself.

Q. This took place in 1964. Can you tell us about what month if you can recall?

A. Yes, it was August 11, 1964.

Q. Did you inquire of still another group station owner, sir?

A. Yes. I inquired of Capital Cities Broadcasting. Capital Cities Broadcasting never met with ITT. I had several meetings with them. They decided that they were not available [2638] for purchase.

Q. Was this the extent of your quests for ITT, these companies you mentioned?

A. Yes.

Mr. GORDON. No further questions.

CHIEF HEARING EXAMINER. Mr. Fitzpatrick?

Cross-Examination by Mr. F. McKenna:

Q. Mr. Stark, how long have you been in the station brokerage business?

A. About 19 years.

Q. In this period of time, how many stations have you brokered if that is the proper term?

A. I don't know the number. I can tell you in dollar volume. It is over \$200 million worth. Mostly television stations.

Q. You don't have any idea how many television stations that would be?

A. No, I have never counted them.

Q. 50?

A. At least.

Q. So, your reputation as a broker of stations is pretty well established?



A. I believe so.

Q. That is why Mr. Witting contacted you or did he [2639] indicate why he contacted you?

Mr. COHN. I object, Mr. Examiner. There is no such testimony as that.

By Mr. F. McKenna:

Q. You bumped into Mr. Witting on the street?

A. We were old friends.

Q. He knew of your reputation?

A. Yes.

CHIEF HEARING EXAMINER. Do you withdraw your objection?

Mr. COHN. I do, sir. Two old friends running into each other on the street.

CHIEF HEARING EXAMINER. Proceed.

By Mr. F. McKenna:

Q. You stated you met with Mr. Geneen once in June of 1964, is that correct?

A. That is correct.

Q. Was this meeting arranged at your request?

A. I had asked Mr. Witting whether or not Mr. Geneen knew what we were talking about. He said he did and "I would like you to meet him one day".

Mr. Geneen is not in town very often but one night he was in town and I was at Mr. Witting's office around 6 or 6:30. He said "Mr. Geneen is in there. Let us go say hello."

That is about what it was.

Q. At that time did Mr. Geneen give you the outline of [2640] what I had in mind?

A. No, he just said, "The Broadcasting industry looks very interesting. We are under a program of diversification. This might be one area which we would like to explore."

Q. Your reporting was through Mr. Witting, not directly to Mr. Geneen?

A. That is right.

Q. Mr. Gordon asked you about Document J-208. You stated with respect to Paragraph 2 there of that you had no recollec-

tion of the sentence that referred to "the 8 to 12 times earnings might conceivably be attractive to us", is that right?

A. I have no recollection of that, no.

Q. At that time, at about what ratio of earnings were television stations going for?

A. Well, it depends on what the market was. They were going closer to 20 times.

Q. Then the request that you look at 8 to 12 times was unrealistic?

A. That would have been a very good buy, yes.

Q. Had someone said to you, if you can pick it up at 8 or 10 or 12 times, that seemed to be rather out of the ordinary, did it not?

A. I would say they were good buyers if they could buy them.

[2641] Q. My question is, don't you think that a statement like this would have stuck in your mind?

A. Well, they were exchanging stock. That was their idea as far as purchasing a station. The 8 to 12 times earnings was a very good ratio.

Now, maybe he was not as well acquainted with the current market at the time as I was. But it was a seller's market for stations.

[2642] Q. Do you recall discussing with Mr. Witting or Mr. Geneen any ratio?

A. No, we never got that far. Of course, we were dealing with Storer Broadcasting and Capital Cities and they were public companies. We knew the ratio there was established.

Q. Corinthian is not a public company?

A. No.

Q. What was the ratio that was established with Storer at this time?

A. I don't remember. I think it was about a little over 12 times, but you could not buy the company for that.

Q. Do you recall communicating a particular ratio to the owner of Storer's?

A. No.

Q. How about to Capital Cities?

A. No.

Q. Now, you stated you contacted these three group owners and then ceased your efforts; is that correct?

A. I had many clients that I had been working on. I sold stations during the period I was working trying to find a group for ITT but I did not limit my activities to ITT. I have long-time relationships with clients who own two or three stations, wanting to buy another one and I had many obligations. So I could not show ITT all the stations that I had been working on.

[2643] Q. You contacted these three persons for ITT?

A. Yes.

Q. After that contact did you do any more contacting for ITT?

A. No. Never mentioned their name again.

Q. Did you quit of your own volition or were you requested to quit?

A. I quit on my own volition. I did not really quit. I was busy doing my other work.

Q. You saw no hope for it or why?

A. When I get a property for sale I have to suit the client to fit the station. Certain clients have geographical preferences. I had been working for two years on one particular station with a client. We finally closed the deal, but I could not offer that to ITT. I worked with one client at a time on each particular deal.

Q. Another business interrupted your search for ITT?

A. I would say so.

Mr. F. McKenna. Thank you.

CHIEF HEARING EXAMINER. Mr. Bergson?

Mr. Bergson. No questions.

CHIEF HEARING EXAMINER. Mr. Cohn?

By Mr. COHN:

Q. Mr. Stark, I have a couple of questions I would like to ask you. First, as far as your relationship with ITT is [2644] concerned, you had no contract as such to represent them, did you?

A. No.

Q. This was really just a couple of old friends, you and Chris Witting having talked about this, if you found something that

you thought ITT would like you would call it to his attention?

A. I would say so.

Q. Mr. Stark, at any time did either Mr. Witting or Mr. Kenmore or Mr. Geneen implicitly or explicitly state to you that they wanted to acquire these stations in order to establish a network?

Mr. GORDON. I object to this. He is going outside the scope of my examination. If he wants to make this witness his own, let him call him on the part of his case.

CHIEF HEARING EXAMINER. I think it would save time, Mr. Gordon. I think the question is interesting and pertinent—

Mr. GORDON. He is going beyond the scope of my examination.

CHIEF HEARING EXAMINER. I recognize that, sir, but it ought to be developed here.

Mr. COHN. Will you read the question back?

(The reporter read the record.)

The WITNESS. No, they did not.

[2645] By Mr. COHN:

Q. At any time did either one of these three individuals indicate an interest in acquiring independent television stations, that is non-affiliated television stations, for the purpose of establishing a network?

A. They didn't.

Mr. GORDON. I object now. He has made the witness his own. Now he is not going to be able to lead him.

CHIEF HEARING EXAMINER. Same ruling. I do think, Mr. Cohn, on this new material, and it is in a sense, I think the witness should not be led. To that extent I will sustain the objection.

By Mr. COHN:

Q. May the witness answer the last question?

A. They did not.

Mr. GORDON. The question has been ruled objectionable.

Mr. COHN. I don't think the Examiner has ruled.

CHIEF HEARING EXAMINER. I do, sir. I think it is misleading. I will strike the answer and let counsel proceed.

By Mr. COHN:

Q. Mr. Stark, did anyone from ITT at any time discuss with you or indicate to you any interest in acquiring non-affiliated television stations?

A. They did not.

Q. Mr. Stark, you testified that since 1950 you have [2646] been totally involved in the buying and the selling as a broker of television and radio stations?

A. Yes, sir.

Q. You have had a great deal of experience as far as the economics of the radio and television industries are concerned because of your particular profession?

A. I believe I have.

Q. Mr. Stark, do you have an opinion as to whether or not it would be economically feasible for anyone in 1967 to attempt to establish a television network?

Mr. GORDON. I object to that

Mr. FITZPATRICK. Objection.

Mr. GORDON. This man has not been ruled competent to testify as an expert on these matters. He is way outside the scope of the direct examination.

Mr. COHN. I am disturbed by the government's opposition to that. I had thought the witness was qualified by the government. Obviously the Broadcast Bureau was interested in the prominence of Mr. Stark.

I come from the old school where a lawyer gets the courtesy of finishing a statement before interruption.

Mr. FITZPATRICK. But not misstatements.

CHIEF HEARING EXAMINER. Proceed.

Mr. COHN. In addition to that, Mr. Examiner, I thought it was the Department itself that was so adamant and so violently [2647] intent upon establishing the full and complete record so that this Commission would have all of the important facts in front of it. I am somewhat startled that the Department itself on a simple question such as this with an expert which Broadcast Bureau has qualified should be objecting to a question such as this.

CHIEF HEARING EXAMINER. I find he is in no way qualified to answer the question. I will sustain the objection.

Mr. COHN. Mr. Examiner, if the witness were permitted to answer the question I make the offer of proof that he would have answered that in 1967——

CHIEF HEARING EXAMINER. Can you vouch for this, Mr. Cohn?

Mr. COHN. Mr. Examiner, I vouch for it in the sense——

CHIEF HEARING EXAMINER. You don't know whether——

Mr. COHN. He is not my witness.

CHIEF HEARING EXAMINER. You are assuming he might. I cannot permit such an offer of proof.

Mr. COHN. Mr. Examiner, as I told Mr. Kestenbaum, I intend to talk to all the witnesses which the government had requested to appear and testify. I have talked to Mr. Stark prior to the time of his testimony today. I have discussed this precise question with him as to whether or not in his judgment, in his opinion, it would be economically feasible by the wildest stretch of the imagination for anyone [2648] to attempt to establish a television network in the US. Consequently, based upon what Mr. Stark told me in that conversation, I am making the offer of proof.

CHIEF HEARING EXAMINER. Proceed.

Mr. COHN. That if Mr. Stark were permitted to answer the question he would have testified that it would be economic disaster for anyone to even contemplate the establishment of a nation-wide television network, new nation-wide television network.

Mr. Stark, that is all I have. Thank you very much.

CHIEF HEARING EXAMINER. Unless there is something further——

Mr. GORDON. I will ask a few questions.

#### REDIRECT EXAMINATION

By Mr. GORDON:

Q. Mr. Stark, how long have you known Marcus Cohn personally?

A. I met Marcus I would say 1948 or 1949.

Q. Have you been a good friend of his ever since?

A. I don't see him very often but we have had several business dealings together. He represents certain clients, people I have sold stations to.

Mr. FITZPATRICK. Mr. Examiner, I don't see the relevance of this. I object.

[2649] By Mr. GORDON:

Q. When you were questioned about Witting and you being old friends did you regard the instructions you had gotten from ITT to find them a group station owner who might be interested in selling as a business—this was a business relationship you were entering into with ITT or just a social, old friend type relationship?

A. It was a business relationship but I think I probably, dealing with a company as large as ITT—

Q. Excuse me. I think you have answered the question.

Mr. COHN. I think the witness should be permitted to finish his answer, Mr. Examiner.

Mr. GORDON. My question was whether he regarded this as a business relationship with ITT and he said yes.

Mr. COHN. Then he went on to explain.

The WITNESS. May I explain it?

CHIEF HEARING EXAMINER. Proceed.

Mr. GORDON. I think you have answered the question.

Mr. COHN. I think the Examiner indicated that the witness should proceed.

CHIEF HEARING EXAMINER. No, I think the question has been answered. He has given us all the facts and his judgment was that it was a business relationship.

By Mr. GORDON:

When you had discussions with Mr. Witting and Mr. [2650] Kenmore about possible group station owners, did you have a list that you went down the line and talked about, this group owner might be a possibility and this one might not? How did you proceed?

A. It is such a small business. We who have been in the business this long know which are privately owned, which are publicly owned. I have sold stations to most of the people that own more than one station in the country.



Q. Did you discuss though the companies that might be acquisition possibilities?

A. Yes, but not formally. Not with a list. We just discussed which were available.

Q. Did you have any instructions from ITT to pass over stations or groups that had not affiliations or was this not discussed?

A. It was not discussed.

Mr. GORDON. No further questions.

CHIEF HEARING EXAMINER. Sir, when you quit looking for broadcast properties in behalf of ITT, did you have any conversation at all with anyone, any officials of ITT, Mr. Witting or anyone else?

The WITNESS. I think we had conversations, Chris would call me and I would call him. And since I didn't have anything for him we discussed the possibility of the growth of the industry, we had more or less economic discussions.

[2651] CHIEF HEARING EXAMINER. It was just dropped right there?

The WITNESS. Yes.

Mr. COHN. Mr. Examiner, I have one question.

CHIEF HEARING EXAMINER. Proceed.

#### RECROSS-EXAMINATION

By Mr. COHN:

Q. Mr. Stark, did you ever bill ITT for your services or were you ever paid for any services you performed for ITT?

A. I wasn't billed and I didn't expect to be paid.

Q. Did you ever bill them?

A. No, I did not bill them at all.

Q. Did you ever receive any compensation from them?

A. No, I didn't.

By Mr. F. McKENNA:

Q. You are a broker; is that correct?

A. That is correct.

Q. How are your fees paid?

A. My fees are paid only if the deal is consummated and approved by the FCC.

Mr. F. McKenna. Thank you very much.

CHIEF HEARING EXAMINER. Mr. Gordon, finally?

Mr. Gordon. No further questions.

CHIEF HEARING EXAMINER. Thank you sir. You are excused.

[2669]

TESTIMONY OF ASHER H. ENDE

By Mr. GROSSMAN:

Q. Mr. Ende, in the period from July 1, 1954 through February 1956, was there in existence any regulation of the Federal Communications Commission regarding the reporting to the Commission of contacts by International Common Carriers with foreign Governments or agencies of foreign Governments?

A. There is a rule of very long standing which was in effect at that time, Section 43.52 of the Rules, which as I recall it, requires all common carriers subject to the [2670] jurisdiction of the Federal Communications Commission to make monthly reports regarding negotiations with any foreign entity insofar as telecommunications are concerned and there is a further provision of those rules which requires such entities to file the actual copies of contracts resulting from such negotiations with the Commission.

Q. Mr. Ende, I show you Section 43.52 of the Commission's rules. Was that provision or a substantially identical provision in effect in the period to which I have just referred?

A. Yes, sir.

Mr. COHN. I object, Mr. Examiner.

The witness has already identified the rule and told us what was in the rule at that particular period of time.

CHIEF HEARING EXAMINER. Official notice of the rule may be taken, Mr. Grossman.

Mr. GROSSMAN. I so request, your Honor.

CHIEF HEARING EXAMINER. Very well.

By Mr. GROSSMAN:

Q. Have you had occasion within the past few weeks, Mr. Ende, to examine the records of the Federal Communications Commission relating to reports submitted by ITT and subsidiary companies with respect to negotiations with foreign Gov-

ernments during the period July 1954 through February 1956.

A. Yes, sir.

[2674]

In your examination of the reports that ITT and subsidiary companies regarding negotiations with foreign Governments in the period July 1954 through February 1956, did you find reported any of the contacts and negotiations referred to in the documents included in J-261?

A. No, sir.

[2680]

Q. Would you please give us a brief description of the nature and scope of the contacts, negotiations, contracts, with the foreign Governments or entities of foreign Governments which International Common Carriers regularly engage in today?

A. These contacts occur at several levels depending upon the nature of the argument or understanding sought.

The most common and most frequent is what might be called the relatively low level between the tariff or rates officials of the American Common Carriers and the corresponding officials internationally and they are concerned with what one might say the nuts and bolts of the business.

It is the every-day agreements for minor changes and services to be provided, changes in divisions, changes in routing of facilities, different intermediary relay points. These I think occupy about 60 to 70 percent of the activities [2681] as reflected in reports to this Commission and as reflected in conversations with the foreign representatives.

Then there is a second level of negotiations which are conducted at a higher level, usually by the vice presidents or senior executive officials of the company. These relate to the opening of new circuit, institution of major new services in the international field now, discussions with respect to the use of the very high capacity cables which have been laid in the past decade and the even newer satellite facilities.

In these situations the presidents of companies travel abroad or invite their corresponding officials, Governmental or private of the foreign companies to come to this country.

The Pacific area has been particularly active because of the Vietnam War in attempts to reach agreements with foreign entities to meet the very high needs of the Department of Defense for prompt, secure and adequate communication facilities with the coming of satellites there was a great flurry of activity at the highest level in all of the companies, each striving quite properly to establish a competitive and preferably earliest beachhead in the communication with the various countries by satellite.

There were also strenuous efforts made on the part of each of them to capture the very important telecommunications business of the Department of Defense.

Finally there has been a whole surge of discussions in the [2682] past year at the highest level on the important rate question, that is, attempts on the part of the American Carriers generally to convince their foreign correspondents to reduce charges for high capacity facilities to reflect the economies made available and to encourage even greater use.

Most of these discussions are at the operating level but periodically Governmental intervention by the FCC and particularly by one entity, ComSat, by the Department of State are requested, ComSat having obligation under the law to report its foreign negotiations to the Department of State and to seek from the Department of State specific advice as to how its particular communications activities affect the foreign policy of the U.S. or are affected by the foreign policy of the U.S.

The other international carriers are not subject to such specific legal constraint but quite obviously as representative of American citizens they keep the Department of State adequately advised.

Q. You referred to recent negotiations by international common carriers with their foreign correspondents. What did you mean by foreign correspondents?

A. In order to conduct an international communications, you must have agreement between two entities. We, with very few exceptions, by we I mean U.S. companies, do not operate the end of the circuit in a foreign sovereign nation.

Accordingly, it is necessary for the American carrier before it can establish a communications circuit, be it by high fre-

quency radio, cable or satellite, to reach specific agreement with the PTT or private operating company abroad regarding the exact way in which the circuit is to be operated.

If it is by radio, the frequencies to be received and sent and when those frequencies are to be shifted, the hours during which they will correspond, the types of traffic that will be handled, the charges that are going to be made, the manner in which those charges are going to be divided.

If it is by cable, you don't have the radio problem, but you have everything else. If it is by satellite, then there must be agreeable arrangements made with respect to the operation of the ground stations.

Q. Are these foreign correspondents generally governmental entities?

A. For the most part with relatively few exceptions, they are governmental or corporations wholly owned by governments.

[2684] Q. Would there be any European countries which are an exception to that general rule?

A. I believe that Italcable in Italy is not fully owned by the Government and it may be that Radio Swiss is not a wholly-owned entity. Marconi in Portugal is a subsidiary of Cable and Wireless of Great Britain.

With those minor exceptions in Europe, they are governmental entities or corporations like Cable and Wireless which is wholly owned by the government.

Q. Is the entity at the receiving end of the international cable in Japan a governmental or non-governmental entity, Mr. Ende?

A. It is a non-governmental entity but the Government has an interest in it and I believe names a certain number of directors to it. So, it is affiliated with the government although private enterprise.

Q. What would be the situation in Australia and New Zealand? Are they governmental or non-governmental entities?

A. In Australia and New Zealand, they are governmental. It is the PTT.

\* \* \* \* \*

[2721]

## TESTIMONY OF EDWARD E. BENHAM

By Mr. HUNTER:

Q. When you first began your assignment, you had several meetings with ABC personnel, is that correct?

A. Yes, sir. During August I think there were two or three meetings with the ABC personnel.

Q. With whom in the ABC organization?

A. Mr. Siegel, Mr. Barnathan, and then various members of Mr. Barnathan's staff as I went from location to location in ABC inspecting facilities, becoming familiar with their technical plant and facilities.

Q. You inspected their facilities during this time period?

A. Yes, sir.

[2723]

Q. You also indicate in this memorandum that there is some internal disagreement at ABC regarding the so-called master plan of expansion.

A. Yes.

Q. What parties were involved in this disagreement?

A. It was a general disagreement, not specifically. There had been a master plan submitted by the Austin Company, I believe.

Q. Could you answer my question, sir, what parties were involved in the disagreement?

A. To my specific knowledge, there was Mr. Siegel, Mr. Barnathan, and several members of Mr. Barnathan's staff who disagreed with portions of the report and plan.

Q. Your document indicates, does it not, that there is some internal disagreement at ABC?

A. That is correct.

Q. Disagreement between persons within ABC?

[2724] A. I don't believe that was the intent of that statement, no.

Mr. BERGSON. I think the document is clear on its face.

Mr. HUNTER. I think the document is clear on its face that there was internal disagreement within ABC.

CHIEF HEARING EXAMINER. Proceed.

By Mr. HUNTER:

Q. I ask you again which parties disagreed with other parties in ABC.

A. I can't answer that. I just don't know specifically. I know that each of the parties involved had some disagreement with the plan and they weren't all about the same portions of the plan.

Q. Is it not possible that people within ABC disagreed among themselves?

Mr. BERGSON. I object. He is asking for speculation.

CHIEF HEARING EXAMINER. Overruled. He may answer.

The WITNESS. I suspect there might have been.

By Mr. HUNTER:

Q. What were the different positions taken with regard to the plan?

A. I would have to review the entire situation before I could come up with positions. I recall seeing some memorandums from various people which may set forth their specific disagreements but I am not that familiar with them.

[2725] Q. You would not know what the disagreement was, or would you? To the best of your recollection.

CHIEF HEARING EXAMINER. Disagreement in fundamentals, in principles, or in detail, minor detail, major detail, what is your best testimony on that so that we may move forward to something else?

The WITNESS. There were a number of different ideas and plans, the size of the studios, the proposal for an audience studio as opposed to a flat bed studio, the location of maintenance facilities, all of these, the news operation, where it would be relative to the rest of it, who would get offices furthest up.

All of these things I am sure were part of the general discussion which I chose to call a disagreement.

By Mr. HUNTER:

Q. Now, you indicate in your memorandum that the future programming of the network might have some influence on facility planning, is that correct?



A. Yes, sir.

Q. You also indicate on the master plan of expansion in your memorandum that this might be an area where our firm guidance can be of value to the future of ABC?

A. That is correct.

Q. So you expected to take some affirmative action with respect to the facilities plan of ABC?

[2726] A. Certainly after the merger was consummated, we would offer our technical abilities toward assisting them in an overall master plan, yes.

Q. Then you would not be just merely an observer?

A. I can only conjecture as to what—

Q. Were you hired as an observer, sir, just merely to observe and report back to your superiors?

A. I have a copy, someplace there is a copy of a complete outline of my position. No, I don't believe I was hired just as an observer.

Mr. COHN. Mr. Examiner, I have a document entitled "ITT Position Data, Plan Specifications for the Director of the Facility Planning."

I assume that this is the document to which the witness was referring. If counsel for the Department of Justice would like to have the document, I will give it to him.

CHIEF HEARING EXAMINER. If it is available.

Mr. COHN. It is available. I will give it to him right now.

The only problem is that I have only two copies, one of which I will give to Mr. Kestenbaum.

CHIEF HEARING EXAMINER. Well, they may not want it at all, sir.

Mr. COHN. Mr. Kestenbaum can keep his copy. I am advised, Mr. Examiner, that this was handed to the Department of Justice [2727] prior to the proceedings at its request.

Mr. GORDON. To whom did you give it?

Mr. COHN. I did not give it to anyone. I just got through saying I was advised of this.

Mr. GORDON. No one of us knows of having received it prior to this moment.

By Mr. HUNTER:

Q. How would this firm guidance be applied? What form would it take? In what area did you expect to give firm guidance?

A. ITT has a strong capability in planning facilities. They have done a great deal of broad scale planning, architecturally and otherwise.

It was my opinion that this technical assistance or technical guidance would have been a better word than firm guidance, is what I had in mind. There is a large number of engineers available in ITT that can be directed in specific areas.

This was one of the aspects of my job, to find out what we had in ITT that would be useful to ABC from a technical standpoint.

Q. Have you made any recommendations thus far that have been adopted by ABC or by ITT?

Mr. COHN. There are two separate questions. You said are there any recommendations adopted by ABC and then you said ITT.

[2728] By Mr. HUNTER:

Q. Adopted by ABC, first.

A. We did assist them in analyzing a microwave contract which they were going to place, some specifications and a contract, and they did place the contract.

So I assume they did accept some of the recommendations although I don't believe I have seen the contract since it was consummated. They also were working on a design of a portable color special camera which I had the specifications, it had some unique innovations in the camera.

I had these analyzed by one of our companies to determine that they were in fact feasible. It just gave another source. The company with whom ABC was dealing had agreed that it was entirely feasible.

However, they felt they would like a second source opinion. So we provided that for them.

Q. Which organization within ITT?

A. It was the Federal Labs Unit in San Fernando, California.

\* \* \* \*

[2734]

Q. You also mentioned in that memorandum that:

It is anticipated any long term plan will undergo modification. However, if the goal can be established and the aim generally kept constant the more efficient and economic conversion to color and general upgrading of facilities can be accomplished?

A. That is correct.

Q. May I ask you, more efficient than what? With what were you comparing the efficiency?

A. During that period my opinion was that ABC was, by virtue of the pressure of operations, were making their facilities decisions on a "must do it" basis because a program was coming up at a certain time that needed a certain studio of a certain type rather than having what I considered a long-range overall goal or plan which still would change, based on specific program requirements but at least you would have a format to fit modifications into.

Q. By long-range plan how far ahead would you be envisioning?

A. I think four or five years is as far in this business as we should plan ahead.

Q. Why only four or five years? Would it be because program requirements are changing or technology requirements [2735] are changing?

A. I think both program requirements, technology requirements.

Q. I believe you had also a series of meetings in Los Angeles on November 1st to 3rd; is that correct?

[2737]

Q. I believe you mentioned, Mr. Benham, that you had seen some reports in November, 1966, relating to facilities plans, two-year projections.

A. October or November.

Q. I would like to show you a document designated as AR-24. I ask you whether that is one of the documents that you had seen at that time?

A. It was not specifically in this form but I did see a two-year projection which I think this is an extension of.

Q. For what two years would that have been?

A. 1967 and 1968.

Q. After seeing these reports for the pending projects for 1967 and 1968, did you make any recommendations or suggestion on the various projects listed therein?

A. I don't recall any specifically.

Q. Let us go through it again. Exactly what were you [2738] doing on these various facilities plans? What was your role, your function, what activities did you participate in, what recommendations did you make and to whom did you make them?

A. I would cast my role as a very interested observer and almost as a consultant wherein if they had a problem that they thought my experience might be useful they might ask a question. On occasions during meetings I would offer my opinion as to these situations. At no time was I involved in approving or making recommendations.

Q. But you were working in close contact with them and entering into the discussion, were you not?

A. Yes, sir.

Q. Making suggestions perhaps once in a while?

A. Yes, sir.

Q. Often?

A. That is a degree.

Q. The reason I ask you that, Mr. Benham, I show you document J-257, which is a memorandum from you, Mr. Benham, to Mr. Cookson, in which it says and I quote:

We were working on a facilities plan and schedule which would provide a reasonably good indication of the cash flow requirement for bringing the ABC plan up to full color and into a competitive position with the other networks.

By the use of the term "we" does that mean that you were actively participating [2739] in this facilities planning?

A. Yes, sir.

Q. What specific recommendations did you make to ABC regarding the facility in the time period August 1966 to, let us say, February 1st, 1967?

A. I can't recall any specific recommendations. I am sure there were some.

Q. You did not follow it up to ascertain whether your recommendations were accepted by ABC or adopted?

A. No, sir, not to the best of my recollection.

Q. Getting into specific projects, did you have any recommendations with respect to the technical center in New York?

A. Technical recommendations?

Q. Yes. Any kind of recommendations?

A. Not that I recall.

Q. Did you have any recommendations regarding the production complex in New York?

A. Not that I recall.

Q. Would you recall any of the discussions with respect to the technical building?

A. Yes, sir.

Q. When was the decision made to add two additional stories going from 10 to 12 stories on the technical building?

[2740] Mr. COHN. If you know.

The WITNESS. I don't know.

By Mr. HUNTER:

Q. Have the plans been finalized at the present time?

A. Not to my knowledge.

Q. In other words, the technical building is still in the drawing stage.

Mr. BERGSON. So far as his knowledge is concerned.

The WITNESS. So far as my knowledge, yes.

By Mr. HUNTER:

Q. You have continuing liaison with ABC, do you, up until this time?

A. Yes, sir.

Q. With respect to the production facilities in New York, were there any specific series of conferences that included a discussion of this item?

A. You are talking about the 66th Street grouping of studios?

Q. That is correct.

A. I think they were scattered pretty well all through the discussion. I would gather the New York discussions were centered around the 66th Street complexes as opposed to when we would be out west discussing the West Coast facilities.

Q. When, to your knowledge, was a specific estimate of the size, the space, the cost of a new production complex in [2741] New York made?

A. The only final decisions that I am aware of is a plan that was published, I believe, or a projection published February 8 which was then submitted to the ABC board of directors at their February meeting.

Mr. FITZPATRICK. Will you specify the year?

The WITNESS. 1967.

By Mr. HUNTER:

Q. Prior to that time so far as you know there was no plan?

A. I had seen no published plan up until then. There must have been many plans made.

Q. Will you answer the question? You haven't seen them?

A. That is correct.

Q. You were the continuing liaison man with ABC for ITT during this period?

A. Yes, sir.

Q. Did you make any recommendations with respect to this production services complex of studios in New York?

A. As I say I am sure I made several but I can't recall precisely or specifically what they would be.

Q. You are sure you made several but you can't recall anything about the building, or what part you may have had in the discussions about it?

[2742] A. These were general meetings where everybody participates freely. A suggestion coming from me would not necessarily be a recommendation. It may have been made later by other people. I can't in all honesty tell you what specific items that I might have discussed—I question whether I would have many recommendations with regard to a large New York

facility. I am not terribly familiar with the building codes and the requirements of construction in New York.

Q. I show you Chart 11 to document AR-31, which is entitled, "Proposed New York Production Services and Studio Complex." Have you seen that chart before, sir?

A. Yes, sir.

Q. Is this the document you referred to which you said was prepared for ABC planning?

A. I believe that is correct. I believe this is the part of the document that was submitted to the ABC board of directors.

Q. Does that document indicate a height for the production service complex?

A. No, sir.

Q. Doesn't it have a vertical dimension on it?

A. Yes, sir.

Q. That dimension is approximately how many feet?

A. If you want from the street level vertical or from the—

[2743] Q. The entire listed dimension, just approximately?

A. 97 feet.

[2746]

Q. Showing you again Chart 11, which is the studio [2747] production complex, were you ever made aware that there was going to be an addition to the top of that building, to your knowledge?

A. Not to my recollection.

Q. And you have continuing liaison with ABC throughout this period?

A. Could I evaluate the entire plan?

Q. Just limit yourself. You had continuing liaison with ABC?

A. Yes, sir.

Q. Now, during this time period from the time you first were employed by ITT until approximately February 8, 1967, was ABC advising you of technical possibilities wherein ITT might be helpful to ABC?

A. Yes, sir.

Q. Projects?



A. Yes, sir.

Q. Did you ask for such reports?

A. Yes, sir.

Q. Let me show you a document which has been designated as AR-42 from Mr. Max Berry, I believe of ABC, to Mr. Barnathan of ABC, with a copy to you and ask you whether that was one of the documents presented to you listing projects in response to your request for such projects?

A. Yes, sir, I am familiar with these projects.

[2748] Q. Mr. Berry indicated, did he not, that these projects might be useful to ABC and this is why he was so listing them?

A. Yes, sir.

Q. These were of immediate concern to him, were they?

A. I can't judge the amount of concern that he had. They were projects about which he thought the technological knowledge of ITT might be useful to ABC.

Q. Did he send you any other written reports?

A. I don't believe—I may have received a report at some time or a copy of a report on the progress of the hand-held camera specifications.

Q. The hand-held camera plus the six items would have been all that he sent to you in written form at least as far as projects are concerned?

A. Yes, sir. He actually presented these to me as I recall verbally and must have followed this up with a memorandum.

Q. These were the projects that ITT was to be working on?

A. From Mr. Berry, yes.

Q. Were there any other communications on technical projects that might be useful to ABC?

A. Yes, sir.

Q. Who made them and what projects did they concern?

[2749] A. I can recall discussions with ABC regarding the lack of coverage of affiliated stations. We then took on as a project—

Q. With whom were these discussions, may I ask?

A. Mr. Siegel, Mr. Goldenson, and I am sure Mr. Barnathan.

Q. Do you know for a fact whether it was Mr. Barnathan or not?

A. He and I discussed many things and I am sure at some time it was discussed.

Q. During what time period did these discussions take place?

A. This most probably would have started in the area of September-October after I was given the assignment to evaluate UHF in the United States and evaluate the German transmitters.

Q. Would there be any documents to your knowledge that reflect this concern of ABC with UHF and requesting you to work on it?

A. Not from ABC, to my knowledge.

[2759]

By Mr. FITZPATRICK:

Q. Directing your attention to the fourth paragraph of your August 24 memo where you say there is some internal disagreement at ABC regarding the present so-called master plan of expansion, my question to you, sir, is, was that observation that you are making to Mr. Cookson based upon the meetings you had with the various ABC engineering and operations personnel?

A. Yes, sir.

[2760]

Q. What was the nature of the disagreement that you make reference to here in the memorandum?

A. There were a number of disagreements to the plan. There were some individuals who felt that an audience studio was important. There were individuals who felt that audience studios should be converted theaters elsewhere, not on the 66th Street complex.

There were individuals who felt that various studios were too small, too large. There were a number of objections or disagreements with that plan along those lines.

Q. By the various personnel of ABC?

A. Yes, sir.

Q. Including Mr. Barnathan. Did he participate in it?

A. Yes, sir.

Q. And he expressed his views?

A. I am sure he did.

Q. Did you express your views?

A. No, sir.

Q. You just observed?

A. Yes, sir.

Q. Now your next sentence said, "This might be an area where our firm guidance can be of value to the future of ABC."

Was the "our" reference to the ITT organization?

A. Yes, sir.

\* \* \* \* \*

[2779] Q. Has anybody connected with ITT ever asked you to make any projections?

CHIEF HEARING EXAMINER. For what purpose?

Mr. FITZPATRICK. For the purpose of determining what it would cost to make ABC a competitive network.

The WITNESS. No, sir. We are a technical department, and not financial.

By Mr. FITZPATRICK:

Q. Did anybody ask you to inform anybody connected with ITT as to what technical modifications, improvements or alterations would have to be made in ABC's present operation in order to make it competitive with the other two networks?

A. Well, I was assigned the task of learning——

CHIEF HEARING EXAMINER. May I interrupt, sir.

Just that question, if you think about it for a minute and give us yes or no, I think Mr. Fitzpatrick wants that.

The WITNESS. Could you read that question back.

(The pending question was read by the Reporter.)

The WITNESS. No.

By Mr. FITZPATRICK:

Q. Now, sir, what is your understanding as to what your function will be as an ITT employee relative to the ABC operation in the event the merger is granted?

A. My understanding of what my position will be will be [2780] to provide the technical department of ITT such information as will allow them to provide technical assistance and support to the American Broadcasting Corporation.

Q. Are you performing that function now?

A. Yes.

[2790]

By Mr. COHN:

Q. Mr. Benham, you have identified certain meetings that you have attended where you counsel with or conversed with ABC officials. Have you done anything in your role as you previously described it outside of meeting with ABC officials and consultations with them.

A. Well, yes, sir, I have the assignment of the possible supplying of a UHF transmitter to the American market.

Q. What have you done in connection with that matter?

A. I have made two trips to Europe.

Q. Two separate trips?

A. Yes, sir, and I met with the company engineers and people. They have been here in the United States. We have made arrangements, tentative arrangements with a marketing group to import such a transmitter.

[2791] In addition, we have made a study and have one of our companies which has a proposal in preparation for ABC for a film conversion system, a television to film conversion system, which ABC indicated they needed or required.

We are still learning of their needs and we will continue to supply technical assistance or we will supply technical assistance and aid wherever we can.

Q. Do you know whether the hand-held camera to which you referred this morning was ever purchased by ABC?

A. Yes, they have to the best of my knowledge signed a contract with the Ampex Corporation to produce those for them.

Q. Do you have any other employment of any kind, or have you had any other employment of any kind—strike that.

Do you have any employment of any kind outside of your employment with ITT?

A. No, sir.

Q. And you spend full time with that particular job?

A. Yes, sir.

[2802]

CHIEF HEARING EXAMINER. All right, gentlemen, let us have a very brief argument on the deep freeze question that came up this morning in connection with the testimony of Mr. Ende. I am wondering if two minutes wouldn't be sufficient for the Department?

Mr. GROSSMAN. I think I will need three minutes, Mr. Examiner.

CHIEF HEARING EXAMINER. And for ITT, and one minute for ABC.

Do you think two minutes would be sufficient? I would appreciate that, and if you need three, take them.

Mr. Cohn, it is your motion. You will have to proceed first in support of it.

Mr. COHN. As you know, their deep freeze item relates to a period of time from 11 to 13 years ago. This was a period of time when Mr. Geneen was not associated in any manner, shape or form with International Telephone and Telegraph Company, nor with any of the people that I know of who have testified before you associated with ITT, including any of the officers or members of the board.

I would remind you, sir, which I am sure you are familiar [2803] with, of the Commission's report of years ago concerning the question of how far back the Commission, itself, would go in evaluating prior anti-trust violations and other infractions of the law in weighing the character qualifications of an applicant.

The Commission there stated in Docket 9527, and this is years ago, and I am now quoting:

There necessarily must be more concern with recent violations than with those which occurred in the remote past, and have been followed by a long period of consistent adherence to law and exemplary conduct to the part of the applicant.

And then in the ABC-UPT merger that Mr. McKenna referred to earlier this morning, the Commission had occasion, and we are now talking of August 1952, to deal with this par-

ticular matter of how far back you go in permitting evidence to go into a record on past either violations or improper conduct. Bearing in mind what the Department is talking about is not a violation of, but only improper conduct. And the Commission there held that as far as the violation of law is concerned, it would restrict evidence past three years, and certainly that kind of ruling on past violation of the law, itself, should also be germane and important in considering alleged improper conduct.

The Commission has had occasion in recent years to re-evaluate this particular matter. I direct your attention [2804] to the Commission's decision in connection with the television station applications, the multiple television stations for Portland, Oregon, in Docket 9138, where the Commission once again re-enunciated its policy of not dipping back into the remote past in order to dredge up what was alleged to be either violations of law or improper conduct.

More recently, Mr. Examiner, and I am sure you are very familiar with this, is the Commission's statement of July 28, 1965, on the policy statement on comparative broadcast hearings, where the Commission set forth the different standards by which applicants were to be judged in comparative hearings. When it got to the question of character, which is essentially what the Department of Justice is arguing here, it is stated as follows:

Our intention here is not only to avoid unduly prolonging the hearing processes, but also to avoid those situations where an applicant converts the hearing into a search for his opponent's minor blemishes,

and now I emphasize these words,

no matter how remote in the past or how insignificant they are.

Now, what the Department of Justice had done here is literally dredge up something 11 or 13 years ago, and have come forward here as though this particular item of those many years ago could have any relevancy or materiality to a resolution of the pending application before the Commission, [2805]

with the present board of directors, with the present officers of the company, and to me it is the most simple kind of a thing, that the Commission, based upon all of these past precedents, would hold that these remote things of 11 and 13 years ago have no cognizancy whatever to the evaluation of these applications.

My two minutes are up.

CHIEF HEARING EXAMINER. Mr. Fitzpatrick, you are next.

Mr. GROSSMAN. We are the proponents of this evidence, Mr. Examiner.

CHIEF HEARING EXAMINER. I think you would be final.

It isn't important, if you wish to argue now, it would be appropriate.

Mr. McKENNA. I am prepared to have Mr. Grossman go next, if he wishes.

Mr. GROSSMAN. I yield to you, Mr. McKenna.

CHIEF HEARING EXAMINER. If you desire the minute, feel free.

Mr. McKENNA. Quite frankly, I have divided emotions on the evidence. I feel very strongly that it should never have been offered by the Department to begin with. I think that they should have realized how remote and insignificant it is. At the same time, it does establish the poverty of their case in these areas if they have to go back 11 and 13 years to come forward with anything.

[2806] So, in that sense, I think it is somewhat to our advantage to have it in the record, because, as I say, it does establish that they don't have anything.

I also recognize that there is a practical physical problem about striking it out, because it extended over many pages. The document has been referred to. The reporter would have a most difficult time physically striking it, and therefore if you do not act favorably on Mr. Cohn's motion for this reason, namely, the physical difficulty of so ruling, I think that you might leave it in as an offer of proof by the Department, but not have it received in evidence, but merely leave it in the record and the pages of the transcript, so that the Commission can have it available to it if it decides that it should be received.

CHIEF HEARING EXAMINER. Your time is up.



Now, Mr. Grossman.

Mr. GROSSMAN. At the outset, Mr. Examiner, I would like to put this question in its context. As far as the Department of Justice is concerned we are done with the evidentiary presentation of this issue, with respect to deep freeze, as soon as we get the stipulation from Mr. Cohn as to the identity of the persons and organizations named in the documents.

Therefore, unlike the ABC-UPT proceeding there is not going to be any lengthy exhaustive dragged out evidentiary [2807] presentation as to these matters in the past.

Therefore, even if we were more remotely in the past, even 20 or 30 years, I should think that Your Honor would want to leave them in the record for the Commission to consider them, and for the determiner of the facts to decide what weight he wants to give them.

Secondly, I would suggest that these documents are by no means so remote as Mr. Cohn has suggested. As Your Honor will note in looking through the documents, very many of them were either written to or written by Ellery Stone, and if your Honor will look at Exhibit J-331, the ITT 1966 annual report, you will note toward the rear, in the listing of the members of the ITT board of directors, that Ellery Stone is a member of the board of directors of ITT.

I have also been informed, and I am not able to check this definitively, that Mr. Stone occupies a very important position as a general officer of ITT European activities. He is also a vice president of ITT.

Many other of these documents refer to a Mr. John Hartman, Mr. John Hartman is today an important officer of ITT.

Now, Mr. Cohn has referred to all of these occurrences being prior to the Geneen era. I would only point out that this suit was instituted in June of 1960, and has been vigorously prosecuted by ITT since then. This is entirely within the Geneen era, and therefore the Geneen administration [2808] has by no means attempted to disassociate itself from this conduct or from these activities.

Finally, I would like to suggest that the Commission's opinion, itself, in approving this merger is directly contrary to

Mr. Cohn's suggestions that the Commission is only concerned about the past three, four, or five years.

On page 16 of the opinion, the Commission states:

As ITT has been a common carrier licensee of the Commission since the Commission was established, we have observed its operations, and kept informed as to its interests and activities continuously. Its record has been exemplary.

Therefore, the Commission itself went very far back in looking at ITT's record and it surely would want to have before it the additional light which is cast by the documents in J-261.

Thank you.

CHIEF HEARING EXAMINER. Very well.

Mr. FITZPATRICK. Mr. Examiner, I do not support the motion to strike, and I do it for the reasons that I think that while it could be argued and has been argued with some persuasiveness that the evidence and materiality and relevancy is not all-persuasive, I think it has sufficient weight and sufficient probative value to stand in this record in the light of what was adduced this morning.

I have some difficulties with this myself, with Mr. Cohn [2809] being the moving party to strike all of their evidence when quite a bit of it was adduced through his cross-examination. I would respectfully submit that cross-examination of the nature of Mr. Cohn's constituted a waiver of any right to claim that this evidence should not be a part of this record.

Mr. COHN. Might I take 30 seconds?

In reply to Mr. Fitzpatrick, I objected to some questions at the very outset of Mr. Ende's examination, and you overruled the objection and gave me the opportunity to move to strike. So that disposes of that.

CHIEF HEARING EXAMINER. I think counsel raised the objection timely, but I am responsible. I said I will receive it and entertain a motion to strike.

Mr. COHN. That disposes of Mr. Fitzpatrick's last argument.

As far as Mr. Grossman's argument, I would remind you that the Commission is fully aware of all of these documents and has

been fully aware of all of these documents, because it was involved in the litigation. Despite its awareness of these documents it has gone right ahead and granted licenses to ITT and all of its subsidiaries. The Commission has never raised a question concerning this deep freeze matter.

Consequently, although the Commission is not bound, sir, in any legal sense or precluded from raising it at a subsequent date, I don't think that the Department should attempt to make [2810] the argument which is really a red herring argument as though they discovered it now for the first time, and calling it to the Commission's attention for the first time, when in fact the Commission knew about these documents long before today.

CHIEF HEARING EXAMINER. On the ground, gentlemen, particularly, that the ITT conduct involved in the deep freeze matter was so remote, wholly prior to the Geneen era, and Geneen's immediate associates now, I am going to grant the motion to strike, but not physically, from the record. I want it to remain in the record for the benefit of the Commission, but I want it understood that I don't consider it proper evidence, probative evidence under the issues we have here.

That will be the ruling and you have your exceptions.

[2811]       \*       \*       \*       \*       \*

Mr. KESTENBAUM. We have a witness.

Before we do that, may I have a moment for an application, sir?

This morning I was advised by Mr. Fitzpatrick that he had requested the appearance as part of his case of an official of ITT, and I understand this is an official who has responsibilities in the public relations area and that the Broadcast Bureau wishes to explore with that official matters raised by a story which appeared in the Wall Street Journal on Monday.

That story, to go on, contained allegations that representatives of the company or officials of the company had been making efforts to affect the press coverage of this proceeding, and the independent news judgments of journalists and media involved in covering this proceeding.

Now, I would certainly agree that it the issue which the Bureau wishes to explore is a matter of relevance, and the Commission referred in its opinion in December to its belief that the freedom of broadcasting journalistic function demands eternal vigilance, and I certainly would not object [2812] to the Bureau's presenting that.

However, I may say that the matter has been under consideration in the Department since I learned of it this morning, and I have been instructed to propose that before the Bureau interrogates the ITT official or officials who are assertedly involved in these activities, that we tender or we request the appearance of the persons who are allegedly the recipients of these activities or these alleged pressures.

Therefore, sir, I would like to request that you issue on the Department's behalf three subpoenas.

[2813]

Mr. KESTENBAUM. If I may identify the, sir, Mr. Aug is an employee of the Associated Press. Mr. Stout is an employee of the United Press International. And Miss Shanahan is an employee of the New York Times.

CHIEF HEARING EXAMINER. The subpoenas will be issued forthwith.

[2816]

#### TESTIMONY OF ALBERT E. COOKSON

By Mr. KESTENBAUM:

Q. Could you tell me what your responsibilities are as technical director of ITT?

A. I am responsible for all research, development and engineering, in ITT, amounting to about \$200 million odd a year.

Q. Where are you located?

A. 320 Park Avenue, New York.

Q. Are there specific facilities that are under your responsibility, or do you coordinate all technical activity no matter where it takes place?

A. I coordinate it all no matter where it takes place, but I do have a staff of my own, normally about maybe 20 [2817] peo-

ple in New York, and I have partial control of a staff in Europe, too, four or five additional people.

[2818]

Q. You described your staff in New York as consisting of about 20 people. Where does the technical work that you supervise or you coordinate take place in large part?

A. All over the world. We have about 20,000 people engaged in technical functions, and they are located all over the free world, I would say. I can tell you a little more if you want.

Q. Well, what I am trying to pinpoint is whether these individuals or these engineers are technical people who are in plants, subject to the supervision of the plants or are they in laboratories who report to you?

A. They are in plants and in laboratories. Now as to the laboratories, it is a complex reporting structure, but in [2819] general they are in the engineering organizations of various manufacturing companies. Then we do have several laboratories which have dual reporting generally, and they report partially through the technical chain of command, and usually the head of a laboratory will report for some administrative functions locally.

If you have a lab in England, you have the man report to the senior man in England for administrative purposes and then he will report through the staff organization that I run for technical direction.

Q. I see, and if it is a factory, and there is an engineering group, the engineering group will be reporting to whoever is in charge of the factory, and at the same time he is reporting directly to you?

A. Well, that is right. You realize that my function chiefly is a staff function, and so that the day-to-day direction of the engineering staff in a company is under the line management.

We do exercise various levels of control depending on what makes sense. In some things we have practically nothing to do and it is just established by budgets on a yearly basis, and in some things which are world-wide development projects we will control reasonably closely.

But we will never direct them on a day-to-day basis.

Q. I think that terminology was used by a former employee [2820] of ITT, who appeared in this hearing, Mr. Graham. Do you know him?

A. I know Jack Graham. I worked for him.

Q. You worked for him?

A. For a spell, yes.

Q. And he referred to the staff line function and that would make you a staff function person, that is what you meant?

A. That is right, exactly.

Q. Has this staff line relationship been a continuous practice in ITT so far as you recall, or is this a recent innovation, or what?

A. I think it has been a continuous practice as long as I have been in a position to know. They have always had an ITT technical director in New York, with a job comparable to mine.

Now, it may have evolved over the years, and I am only intimately familiar with it over the last few years.

Q. How long are you in this position now?

A. I have been in New York for a little over two years. I have been in this exact job for a little over six months, although the previous job was really essentially the same, and it was a title change principally.

Q. What was your immediately preceding job, sir?

A. The one right before this, I was deputy general technical director, and my present job is technical director, and the role I played is similar, although the new job has [2821] more of a connotation of direct responsibility.

Q. The deputy job goes back two years and what were you before that?

A. That goes back two years ago February, when I became deputy technical director. Before that I was vice president and general manager of ITT Telcom, which is a company that we set up over in Bailey's Crossroads, over in Virginia.

Q. Was the same relationship insofar as you know, or did the same relationship exist at that time, when you were down here in ITT and Telcom?

A. I don't understand the question. Was there a technical director in New York?

Q. With a staff function down to the engineering group, and at the same time a line responsibility?

A. Yes, sir, it has existed for a long time. As a matter of fact there has always been a technical director as long as I have been with ITT, and exactly how his function worked might have shifted.

Q. Now, I detect a certain atmosphere of flexibility here, and that is why I am puzzled as to how to proceed.

Mr. Geneen referred to your general supervision of R&D work in ITT.

A. That is right.

Q. And he described or he generally described the criteria by which you evaluate proposed projects. Let me ask [2822] you to start with, the clearest question to myself, which is their annual budget for this activity for technical development or research and development.

A. Yes, sir.

Q. A single item?

A. Well, it is a compilation. There is a business plan for every company, and in that there is an engineering budget, and that budget is broken down into a number of engineering cases.

Now, the total engineering expenditure is the compilation of all of these. That is what adds up to the \$200 odd million. It is the engineering budget of all of the companies.

Q. To what extent do you play a role in preparing or reviewing this aspect of these company budgets?

A. I review them all and approve them all.

Q. At what point do they come to you?

A. They come—there is one step further than that, I am sorry. It is complicated and so I have to explain it. We set up technical objectives for each company, which is called a TO1. It is just a form of the company.

Q. You mean your staff?

A. Or the staff in Europe, the technical department. This may be prepared formally and written up and it may be in the form of direction. Then the company prepares the business plans, and in the business plans the number of cases.



[2823] Then we approve or we review the business plans and we eventually approve them, the total engineering budget. We also approve all of the specific cases, and as a matter of fact in a case as an authorization to do some piece of work, to develop a terminal or switching system or something like that.

Now, we have a fairly heavy interest in a good part of these cases, if it is a worldwide product, something that would have more impact than locally. If it is a case of a company in Germany developing something that is principally going to be sold on the German market, we approve the case and I sign them all.

But if it is something that is going to be sold on a worldwide market then we pay quite a bit of attention to it, and we may in fact initiate the program, based on our feelings in New York, and work out where it is going to be done.

Q. Is there an annual process, the budget is an annual process and the cases?

A. It is annual. There are a lot of projects that go on for years, but there is a case every year, a renewal of the case. That is if you were designing a switching system that ran for five years, there would be a case and it would give the previous years' expenditure, and this year's expenditure, and the future expenditures to complete it.

Q. Well the budget is an authorization. Is there [2824] another approval at the time they are spending money, or is that the single approval that is required?

A. There are really two approvals, an approval of the overall budget, and they submit a business plan, and we work it and argue about it and eventually agree what it will be, and then we approve the overall budget for the year.

Now the cases are subsidiary to this plan, which are essentially a shed-out or breakdown of it and we approve each one of those. Then during the year there are modifications and things will change and they will submit modifications.

Q. Is there a minimum dollar value which they are required to submit to you or is it just the general category of technical work?

A. There is a system where for example a case in Europe, I am not sure of the number, but if it is a modification it is under \$10,000 or something, it is approved locally.

The practicalities of the system are that the things that are not of much importance, the administrative people will essentially approve them and stamp my name on them, really.

Q. Your administrative people?

A. My administrative people, yes, sir.

Q. I take it then that the business plan includes a lot of other things and the technical part of it is pulled out and submitted to your staff to look at, is that right?

A. The business plan is a compilation of all of the [2825] things concerned with the business, the marketing and capital investments and all of the things, and part of it is an engineering plan, and an engineering budget, and a list of cases.

Q. I wonder—when Mr. Geneen was here, there was some discussion or there was some use of a hypothetical which was direct satellite to home broadcasting, as a potential technical development.

I wonder if you could describe to me in a practical term, how this might arise, and how this might be proposed in the organization, and how the steps would be taken in reviewing and approving a development program of such a nature.

Mr. COHN. Just a minute. Mr. Cookson.

I have no objection to the question, but may I ask you, I want you to be sure to understand but are you asking the witness to describe the technical aspects of this?

By Mr. KESTENBAUM:

Q. No, I am trying to ask him—he indicated that there are some projects which originate in the staff, and some projects which come up, and I just picked an example, and will you describe how it might happen with such an example.

A. In that particular one, I can tell you exactly how that one would really go, and you can make three or four different ways of dealing with it.

I think on something like this, considering right now the [2826] satellite to home, I think what we would really do is authorize—let us say we got interested in it—we would authorize a study, probably in one of our U.S. companies, and maybe not. I think the result of it would be a proposal to NASA, prob-

ably at that stage of the game, in an attempt to determine some sort of a contract for experiments or something.

I would have to develop a couple of things. One thing you want to be sure to realize is that the technical department generally doesn't originate programs in a vacuum. There is a commercial arm to the company, the product line managers. They have the responsibility for the commercial activity.

So for any product of substance there is supposed to be a product plan which is the responsibility of the commercial manager, and the product plan authorizes the engineering expenditure.

I am sorry, I——

[2827] Q. When you say "we", were you referring to your staff, or were you referring to a particular laboratory in ITT? When you say you would try to get a contract with NASA, where would this activity take place?

A. This would come in the case I was saying probably from ITT Federal Labs, or one of our divisions.

Q. And they would get this idea, and in what way? Would they put this on paper and send it in to you for approval, or how would this work out?

A. Well, it would depend on whether the primary interest in the thing was coming from headquarters or was coming from the division. But I think whichever way it was, for a study contract say with a Government agency, they would write the proposal and go and try to get a contract, and——

Q. How about a proposal which originates in the laboratory, something perhaps not strictly of governmental nature but with more of a commercial potential, an idea as is proposed within a laboratory or a factory?

A. A manufacturing company, you mean?

Q. Yes.

A. That is how the case system works. They would originate a product plan and a case for that development. That would go through a chain of command that would be approved by the technical people and in the company and it would come up to eventually the commercial people in headquarters and my-

self, [2828] and if we both approved it, that approval would allow them to go ahead.

Q. Could this come up at any time during the year?

A. It can come up at any time during the year. The only thing is that you try to tend to keep the thing on an annual cycle so the paper work doesn't get too confused, but it could come up at any time during the year.

Q. At what point might you submit a case, as you call it, to Mr. Geneen or to the board? When would that happen or how often would it happen and what are the criteria?

A. Well, it would have to be something pretty big. Mr. Geneen doesn't actually usually see or review individual cases. He sits on all of the business plan meetings, and he reviews the overall engineering budgets.

If there is something that is big, and critical, where there is a lot of money involved, he would be directly involved in it.

Q. When you say the overall engineering budgets, the budget would pull together the engineering item in all of the separate companies, or are you now referring to the engineering budgets of companies?

A. He approves the engineering budget for all companies, and then the compilation of that, he approves that. He also approves my administrative budget, because I have to have a budget to run my operation.

[2829] Q. In discussing the criteria which Mr. Geneen said you applied, he referred to the evaluation of proposed projects in terms of the markets, the sales, and the earnings and then he said, "We are going to do the research which we have markets for."

Now, can you tell me how you evaluate that aspect of a proposed case when it comes up?

A. As I say, I can authorize a study of myself, and I have a fair degree of leeway with that. The company regulation is that for anything substantive in development, there should be a product plan.

The product plan is a formal document that culls out what the market is over a period of time and what percentage of it

ITT will get, or should get, and usually it will have a functional specification for the product.

That is appended to the case. When that is signed off by the commercial people, that supports the work in the case. It is essentially authorizing that engineering expenditure.

Q. Now, the preparation is done by the division or the factory or the laboratory which is proposing the job?

A. That is correct.

Q. And when you say the commercial people, you are referring to your commercial counterparts in the staff?

A. There is a parallel staff commercial organization all of the way down, and there is product line managers on all [2830] of the major product lines, at the headquarters and at the area, and at the company levels.

Q. Assuming that it is a project which is at a developmental point, that is a new kind of component or a new kind of electronic or communications system, how often do you review it to try to see whether the money is being well spent and whether it should go forward?

A. I review or we have a thing called the executive task forces, which cover our major product lines. We don't ever have a formal executive task force. We have an informal one, and we try to review the things that are pertinent about every three or four months.

Now, in addition to that, every single case is assigned to one member of my staff, and he has responsibility to see the thing is done well.

But again, with an organization this massive, you have to use some selectivity in the little stuff, which is handled pretty perfunctorily.

Q. But the process of review, I take it, is meant to assure that the work is proceeding satisfactorily or if not, that if you weed it out, I take it——

A. That is right, or that the project still makes sense, and things could have changed.

Q. And the relationship between your staff people, and the place where the work is being done, how did that go? [2831] Is that a direct relationship between your people and the engineers in this factory, or laboratory division?

A. Well, we generally work that way. That is when we go and review a project, we go right into the technical director and the engineering group.

Now, if there is something where there is a conflict or a relatively important decision that has to be implemented, it is liable to be picked up in the line somewhere. That is, I would talk to the president of the company or if it is very important, I would pass it to Mr. Geneen and he would talk to him.

If the thing gets important, it will feed into the line. This interrelation between line and staff is a difficult thing, and you have to live with it. It is hard to explain how it works.

Q. When you were down in divisions or plants of ITT, you were seeing it from the other side, I take it?

A. Exactly.

Q. And were you dealing principally through the president of your company, or were you dealing principally with the engineering staff people?

A. We would have in the company generally a technical director and that technical director would inter-phase generally with the technical director in New York, if there was a U.S. company, and inside the company.

[2832] That would be the normal line unless there is something that gets to be very important. Then the line people would get into it.

Mr. KESTENBAUM. Just to clarify one point, we had approval of the case and we had the approval of the overall budget.

By Mr. KESTENBAUM:

Q. Is there then an approval of the expenditure besides or is the budget approval sufficient to authorize the company to go ahead?

A. When the budget is approved and the case is approved, that is sufficient. Then the company can go ahead.

Q. Subject to the continuing review which you described?

A. Everything is reviewed, because the budget doesn't necessarily hold, and the company may fall short in their sales or something, and then it will be revised and the same with the cases.

Q. Aside from the overall need of the company, the T and D projects themselves require review in terms of their potential and productivity and what-not.

A. Exactly.

Q. Let me digress for a moment to ask you a question about one of your subordinates who just testified here. Mr. Benham is a subordinate of yours?

A. That is right.

Q. And what is his relation with you?

[2833] A. He works for me. He has the title of director, television system planning.

Q. So, does he make regular reports to you of his activities?

A. All of my staff do, yes.

Q. What is the general scope of his responsibility?

A. He was hired originally to give technical assistance to ABC, and it was principally oriented toward the color conversion area. ABC approved Mr. Geneen, and incidentally, Dr. Busignies was involved in there originally but he was hired to give technical support, principally in the color area, and now, since then I have given him a couple of other jobs.

One of them was to advise me in areas where ITT could assist ABC. That is, his responsibility is to understand ABC clearly, and to understand ITT clearly, and to advise me where we can assist them.

That is besides basic technical support functions for ABC.

[2834] Mr. KESTENBAUM. He has indicated he is making regular reports to you. We have some of his memoranda in the record which we discussed with him this morning, talking about his review and contact with ABC, concerning their facilities and their facilities plan.

Did he make recommendations to you with regard to those activities and plans?

The WITNESS. I think almost his complete communications with me is contained in these memos. During most of this period I spent a lot of time in Europe, because our technical director in Europe had resigned and I was in the process of replacing him, and I told him to keep me informed and he sent me this series of memos.



I talked to him, I will be surprised if I talked to him half a dozen times in the first six months he was there. So I think most of the things are reasonably well contained in these memos of what he was doing.

[2835] CHIEF HEARING EXAMINER. On the record.

By Mr. KESTENBAUM:

Q. Thinking over your previous answers, let me ask two clarifying questions.

Could you identify Mr. Busignies for us?

A. Dr. Busignies is senior vice president and general technical director of the company. I report jointly to him and to Mr. Geneen.

Q. What was his position a year ago?

A. He has had the same position for years.

To explain what is going on, Dr. Busignies is approaching retirement. I am not sure how old he is. He is 62 or 63. He brought me in to phase into his job. That is what I am doing over a period of time.

He was sick. He had a fairly serious operation last summer. At that time he put more of the responsibility on me.

Q. In answer to my question concerning expenditures after the budget was approved is it possible that there is a comptroller approval required at that time. Is there any other method of review besides the one provided in your staff?

A. The monthly report of the comptroller, the expenditures on all the cases, in fact the approval to proceed or not to comes from me. The realities are that if the comptroller said that you are overspent, you are in trouble, or something, I would certainly listen to him.

[2836] The comptroller doesn't approve the cases under any normal circumstances but he is the custodian of the budgets. He keeps all the numbers of the company and keeps track of everything.

Q. Do they report the expenditures after they spend the money?

A. They have a plan which is in the case of what they are going to spend. Every month they report what they have actually spent.



Q. Could I ask you a few questions about a memorandum which bears your name which we call J-262 in the record. It is a memorandum dated September 16, 1966. Can you tell me the circumstances of the preparation of this memorandum?

A. Yes. Mr. Geneen has all year been interested, it starting about February of '65, in this question of bringing ABC coverage up to some level comparable to NBC and CBS.

He asked us in, I think it was in February, to make a study. I didn't have on my staff at that time people who were capable of doing it. So we let a contract to Jansky and Bailey down here which did about a six-weeks study of coverage of UHF and VHF television.

It is slanted more toward UHF which was our particular interest. We got that study in March.

Mr. FITZPATRICK. Tell us the year.

The WITNESS. Last year.

[2837] By Mr. KESTENBAUM:

Q. '66. You said '65.

A. I am sorry. It was '66. About a year ago. I have a copy of the study here.

Now that contained a lot of the background information, at least number information that went into this memo. Now as I recall about July Geneen asked me again in a different form similar questions and I wrote about half of this and then he asked me again in September and I put this memorandum together which was the final version of it.

Q. The date of this is a couple of days before the Commission hearing in September. Was the request to put this together in connection with the hearing?

A. I assume it probably was. I didn't know or understand the significance of these hearings or anything. He asks me for probably 10 or 20 things a week.

I supply them or assign them to somebody to write them. He asked me for this writeup and I wrote it for him.

Q. The reason I ask that is that among other information conveyed in the memorandum is the fact that ITT had 20,000 engineers and does \$180 million per year of R&D.

A. This is the stuff I wrote in July.

Q. What were the circumstances of preparing that?

A. I really don't know. He called me, as a matter of fact I was in England and I wrote this in England. I believe [2838] I gave it over the telephone. As I recall, I gave him this over the telephone. I handwrote it and then made a copy and kept it. Then I wrote the rest of the thing in September.

I put the first part of it—as I remember it now, up to Section 12 is all concerned with UHF.

His overall question is what can we do to help ABC in the technical area. So I put all the UHF stuff, which was derivative from the Jansky and Bailey Report plus what ITT could specifically do, I tacked the rest of it on.

Q. The reason why I asked is that it would appear from Mr. Geneen that he probably did not have to be informed of the annual budget or the number of persons. That is why it seemed to me that the number of persons whom you employed to do engineering work—you don't recall why he asked you that or what he said when he asked you that?

A. Are you talking of July or September?

Q. July, this last page.

A. He asked me for a description of what ITT could do to assist ABC in the technical area. As I say I wrote almost word for word that last page in July.

Mr. COHN. In July, sir?

The WITNESS. In July, yes.

Mr. COHN. Thank you.

The WITNESS. Could I make one comment.

It could be the end of June or early July but I remember [2839] it was hot. It was about then.

By Mr. KESTENBAUM:

Q. Were you asked to have it prepared, the September paper prepared, before the hearing was going to take place here?

A. If I remember when I prepared it, I didn't know about the hearing, I didn't understand the significance of the hearing. The hearing was next week, was it not, so I am sure it had some connection with the hearing.

Q. The focus of the memo, as you pointed out, was on UHF activity. I wonder if I could ask you one question and direct a question about VHF. You refer on the first page to low band and high band VHF. We discussed this very briefly last week with Dr. Hill of M.I.T. who was down here testifying.

If I recollect correctly Dr. Hill stated that initially there was a general view in the broadcasting industry that the lowest channel, Channel 2, had the best propagation characteristics. He believed it was now thought that Channel 5 seemed to be preferable.

Do you have any opinion on that, sir?

Mr. COHN. I object to the question.

That is not Dr. Hill's testimony. When I put the question to Dr. Hill on cross-examination and asked him, given the same tower height, the same antenna and the same power over the same terrain, Channel 2 or Channel 13, and I compared the two [2840] from the low band to the high band, which would have superior coverage. It was only with a whole host of qualifications that Dr. Hill testified concerning Channel 5.

He did not testify as Mr. Kestenbaum said he testified.

Mr. FITZPATRICK. Can't we get what this gentleman's own views are aside from Dr. Hill's?

CHIEF HEARING EXAMINER. I was thinking for a moment we ignore Dr. Hill's statement.

The WITNESS. On the question between 2 and 5 let me say that I know this business of propagation well enough so that I can manipulate it. If I can pick it out of the air my tendency would be to say, ignoring the effect of local noise generation and various things that would be worse at the lower channels, in general you would be better off with Channel 2.

By Mr. KESTENBAUM:

Q. What would be worse at lower channels?

A. Man-made noise would be worse as you get down lower.

Q. Mr. Cohn just made a statement that with the same antenna height and with the same power Channel 13 gets less coverage than Channel 2.

A. I would like to reanswer the last question.

This is just a bunch of numbers in a formula. If you take all the numbers and set them up so that they are the same for Channel 2 to Channel 13, now the one thing you have to do is that you have to increase the gain of the receiving antenna [2841] as an inverse function of the square of the frequency. I believe that is the relationship. If you do all of that and you have the same noise figure in the receiver and you have the same loss in the transmission lines and you have the same BRP at the transmitter end, I believe that the theoretical performance would be the same.

Q. Theoretical performance of what, sir?

A. Channel 2 and Channel 13. Now you start to move around with those parameters, in general the transmission lines will be a little lossier at the high frequencies.

In general you will find that the receiver front end will probably get a little worse, although I don't think it is much worse, between Channel 2 and Channel 13. I mean there are a lot of practical factors.

If you line everything up theoretically I believe the numbers will come out and tell you they are the same.

Q. When you are within the VHF spectrum, part of the spectrum, and you are trying to compare the worst channel and the best channel, can you give me an order of magnitude as to what it would cost to make the worst channel perform as well as the best in terms of coverage?

A. Really, I am answering technical questions right out of the top of my head but we have to have three times the effective radiated power in the antenna—at the transmitter and I believe, which would include the antenna and the [2842] transmitter. I tell you this.

I don't want to pick a number out of the air. I can supply you a number, as a matter of fact, if I went through my briefcase and worked on it a couple of minutes. Channel 13 would be a little higher cost than Channel 2. It would not be nearly as much higher though to get the equivalent performance in UHF.

Q. When you say a little higher could you give us a rough idea of the magnitude?

A. Can I look it up in my notes?

Q. If we take a break later perhaps you can supply that. It would be useful for the record.

A. If you want a number now——

Q. Wait until the break, sir.

A. I will give it to you.

Q. Items 7 to 11 in this document lists activities which it is fair to say are potential activities or potential application of existing ITT work or ITT resources to UHF broadcasting.

Isn't that correct?

A. It is more than potential. We have a new high frequency, UHF transmitter, we made arrangements to bring over into the country.

Q. This is since the date of the memorandum, isn't that right, sir?

[2843] A. I would have to check my notes of when we started that.

Q. Between 7 and 12 it is all written in terms of the resources which can be applied or the application of this know-how, of this effect, this kind of thing. It is introduced by the statement, "The specifics of how these technical resources can be brought to bear are suggested in the following sections." That suggests to me these are potential activities.

Is that not right?

A. It is a question of whether you are talking about now or when the memo was written. I think we had on two areas the transmitter—are the tuner diodes in here.

Q. Let us take 7 to 11 first.

A. I believe we had already taken action on it before that. I can check that in my notes if I have to.

Q. Taking action on it before that meant it was proposed to you in the course of the activities, in the course of the presentations which you described earlier, is that right?

A. No. The transmitter was being developed by the formal procedure I told you in Germany. The concept of bringing it over here fell out of these discussions and studies we were doing on UHF coverage because we could see two things.

One, if you can get the fellow to put out about 10 db more power at the transmitter end and if you can get 6 db at the receiver you could get closer coverage of VHF and UHF.

[2844] Q. This application of that work which is being done in Europe was initiated by New York?

A. That is right.

Q. ITT, New York?

A. That is right. Moving a product over to the U.S. market, moving the product in from Germany to U.S. was initiated from New York, from our headquarters.

Q. Was that related to the interest of ITT and ABC?

A. It is to the interest of ABC and to the interest of UHF, the whole pot was boiling with considerations of UHF and we decided when we looked at this transmitter we realized that it was better, we think it is better and potentially may be cheaper than anything in the market.

So it looked like it made sense to make arrangements to get somebody to sell it.

Q. Was there prepared a product plan indicating a percentage of the market?

A. In that case there wasn't. I don't really think the market would support it.

CHIEF HEARING EXAMINER. The answer is complete. Proceed.

By Mr. KESTENBAUM:

Q. So in that case there was no effort to see if that activity would meet the economic test that your commercial counterparts generally applied?

[2845] A. Not a formal effort.

Q. What kind of effort was made?

A. We checked to see that you could sell the thing here and met the market price and bring it in.

Q. What efforts have been made so far to sell the thing here?

A. We have made arrangements with the company, Visual Electronics to handle it. We have worked on the Americanization, some changes in the thing, worked with Varian to get an American klystron. It has a British klystron in it now.

Q. On page 4 of J-262 is Item 12 which refers to activities in process in ITT. This includes the reference to the set components?

A. Yes.

Q. Where was that work being done, sir?

A. In Germany, also.

Q. That work had been initiated under the usual procedure you described, the case had come to you and had been approved?

A. That is right.

Q. For the German market?

A. That is right.

Q. At that point there had been no proposed case that would include the American market?

A. That is correct.

[2846] Q. How did this get translated as a potential activity?

A. The technical department talked with the product line manager in New York for components and we made arrangements to bring the products into West Palm Beach. We are not making the diodes there. We are importing them and selling them out of West Palm Beach.

Q. When you say the technical people, these are your people?

A. That is right.

Q. Spoke to the product line manager. This is again the staff person in New York?

A. That is right. He is the commercial man that I mentioned that handles the commercial end.

Q. In this case was there a product plan with economic justification as we have previously indicated?

A. To my knowledge there wasn't.

Q. Mr. Geneen made reference besides the work on these technical matters to a systems proposal which held out the promise he said of attempting to integrate communities, in an integrated way get communities to switch to UHF.

Would this be a matter that would fall under your jurisdiction?

A. Yes.

Q. Has any effort been done along those lines?

A. Well, we have set up a program for technical support [2847] of ABC which we are going to launch as soon as we are sure this will go through. This will include this systems study of ABC coverage.

Q. Has this systems study been given the product plan analysis that you described?

A. Incidentally product plan would generally apply to a product. A study generally won't.

Q. What kind of economic justification will you require before you go ahead with the systems project or will you require any?

A. It will only need my approval. In a case like this where there is, you know, fairly substantive things at stake Mr. Geneen has already approved it. That is all that is required.

Q. Mr. Geneen has approved it. You have not subjected it to any close economic analysis?

A. That is right. That is not unusual. A number of things are done in our lab.

\* \* \* \* \*

[2851] Q. I can't ask you then what your opinion was when you saw it in November '66 if you did not see it in November '66. What is your opinion when you saw it recently?

A. Could I just say that John Schwartz is a nice 27-year-old fellow out of Harvard Business School without any engineering training at all. When I saw the thing, I called him, I said "John, where in the world did you get your background in UHF?"

He said "I overheard"——

CHIEF HEARING EXAMINER. Will you just answer the question?

By Mr. KESTENBAUM:

Q. Mr. Schwartz was attempting to set forth briefly the economic potential of UHF?

A. That is right.

Q. Do you agree or disagree with what he generally stated to be the economic potential of UHF?

A. I disagree. I think there is an economic potential in UHF, more than he says. He is giving the popular view of a lot of people.

\* \* \* \* \*



[2853]

Q. Let me reframe the question. Information concerning the economic value of the coverage and the economic need of the coverage and the balancing of that need against R&D expenditures would be the kind of information I understood from what you said earlier which you would normally get if a UHF project would go through the case method.

Is that correct?

A. No. The product planning procedure is really set up for a piece of equipment, a teletypewriter, switching equipment, microwave system where you can balance how many you are going to sell of them and how much profit you will make and how much it will cost you to develop and tool.

I have never seen product planning applied to this. You can analyze it in the same way. Part of our systems study is to analyze how much it would cost to bring the coverage up to be equal. But it wouldn't be, your product planning if you look at the document wouldn't fit our regular product planning.

Q. There would be some attempt in any event to measure the cost of the R&D against the benefit to be achieved?

A. Exactly right. We have even taken some rough cuts at it.

Q. I show you this document, AR-42. Were those projects brought to your attention, sir?

A. Yes, that is part of Benham's job to try to inform [2854] me, to give me the information to know how to structure this technical support function for ABC.

Q. You indicated that the UHF projects that you were describing were initiated by ITT staff in New York?

A. That is correct.

Q. Have you had requests like this from ABC with regard to the UHF area?

A. Not to my knowledge, no.

By Mr. FITZPATRICK:

Q. You talked about Mr. Benham performing the technical support functions for ABC?

A. Technical assistance.

Q. Of what does that comprise?

A. Originally, I think it was Mr. Goldenson asked Mr. [2855] Geneen for us to supply a man to help them evaluate principally, as my understanding of it originally was, to evaluate the right equipment for the color conversion.

There is a lot of choice of equipment. There was concern that they would buy the wrong things or something would be obsolete. They asked that we supply a man to give, I guess primarily Siegel an independent judgment.

That was Benham's original assignment.

Q. Has he had some subsequent assignments?

A. Yes, because I gave him the additional assignment of advising me in the area of what made sense for ITT to do for ABC in the area of technical support.

Q. Other than evaluating the right equipment for ABC, was that the extent of his technical support function to ABC, vis-a-vis himself and ABC?

A. I didn't limit what he has done and I think he has done a number of other things. He has helped them in several equipment areas. I think they had a development of a hand held camera and he went out and assisted them on that and I think got some advice from some of our ITT people.

He brought in some expert people. There are a few other odds and ends like that but I can't recall them right now.

Q. Did you have any understanding as to whether he was helping ABC in preparing an overall plan for their color conversion?

[2856] A. I believe he was. I make one other point. Because the merger was not complete, I told him to not interfere in their fields too much but I think he helped them in compiling lists of equipment and I think advised them too on color conversion.

Q. Now, sir, was the Jansky & Bailey report limited to the question of improving UHF coverage?

A. No, the title is some engineering aspects of television broadcasting in the United States. The purpose was to sort of bring us up to date on what the whole picture was. It is oriented to the coverage.

We are particularly interested in the UHF problem and that is picked up.

Q. That is in connection with the ABC acquisition, is that correct?

A. That is correct.

Q. To help ABC?

A. That is right. The whole thing of Geneen's motivation is to try to use our resources to try to help them improve their coverage.

This was the first step to get us educated in what the ball-game was.

Mr. FITZPATRICK. I have no further questions.

CHIEF HEARING EXAMINER. Mr. McKenna?

Mr. J. McKENNA. No questions.

[2857] CHIEF HEARING EXAMINER. Mr. Cohn, will there be anything?

Mr. COHN. Yes, sir, I have a few questions.

By Mr. COHN:

Q. This Jansky & Bailey report to which you referred, 160 pages plus an appendix, is that not correct?

A. Yes. There is a summary report, too. I don't have it here.

Q. I have one preliminary question, Mr. Cookson. Does ITT make any broadcasting equipment in the United States?

A. No, not to my knowledge.

Q. It makes it only in Europe?

A. In Europe and Australia.

Q. That is for distribution and sale in those countries?

A. And other markets outside the United States.

Q. Outside the U.S.?

A. Right. Now, in the U.S. with the transmitter, the transmitter we are bringing in from Germany——

Q. Putting that aside?

A. Putting that aside, overseas markets.

Q. Mr. Cookson, Mr. Kestenbaum asked you some questions about satellite-to-home communications and used that as a springboard for developing with you certain philosophies within ITT.

Have you in fact given consideration to the satellite-to-home communications problem?

[2858] A. We have done a few what we call back of the envelope calculations. We never made a complete study of it.

Q. Do you have an opinion whether technology for satellite-to-home communications has been developed to the extent that most of what is to be known is now known?

A. I would say yes. There doesn't have to be any dramatic extension of the technology. There is a big engineering job to be done.

Q. When you say big engineering job, what do you mean, sir?

A. The average satellite now may put out two to ten watts. This thing is going to have to put out probably 10,000 watts. That means you probably will have to switch over to some sort of nuclear power supply which has been flown and additionally the satellite, these are all my opinions, will be big.

I would guess it would be two or three tons. So that is a big thing to put up into synchronized orbit and it would probably take the Apollo launch vehicle.

Q. Is ITT engaged in any nuclear power projects now?

A. We have a laboratory in Fort Wayne which is doing a project on fusion energy. It is directed to see if we can, we have a concept of how we might be able to use a confined fusion process to generate power on a commercial level. This is a very embryonic thing.

[2859] Q. Mr. Cookson, in your opinion, what are the major obstacles, if any, to making the satellite-to-home communications a reality?

A. As I said, it is a big engineering problem. It is a couple orders of magnitude more difficult space mission for a satellite than I think we have attempted yet. I have referenced a number of odds and ends of problems. I think the biggest problem probably is where the money is going to come from to do it.

If NASA should go after it vigorously, I think they can do it in five or ten years.

Q. Is one of the problems the ground terminals?

A. No, the satellite-to-home is a reversal of what we have been doing. Up to now, we have put a small satellite up and a tremendous ground terminal.

Now, this is the reverse. You put up a big powerful satellite and a little ground terminal. It has to be simple for the home.

Q. Mr. Cookson, have you had occasion, since you have been technical director for ITT to discuss with Mr. Geneen the basic philosophy which underlies your department and your work?

A. Yes, many times.

Q. Have you discussed this with Mr. Geneen?

A. Yes, many times.

[2860] Q. Will you please state for the record what the underlying philosophical approach of your particular department is in the field of technology and research?

A. Well, to move ahead as fast as we can, to keep up with the competition or to move ahead of them in all the product lines that we can. I think that would summarize it.

Q. Do you know, Mr. Cookson, whether ITT has ever undertaken research which conflicts with its present existing products or services?

A. Yes.

Q. Have any of those projects of research made obsolete any of the products or services of ITT?

A. Yes. I would like to answer in two parts. I would take our work on satellites themselves, communications satellites. Dr. Charyk said in the statement we are among the most advanced companies in this field.

Everyone admits that satellites will obsolete undersea cables and undersea cables is one of our biggest businesses. Also I believe communication satellites must obsolete some part of our WorldCom fixed plant.

For example, we are selling or we are attempting to sell satellite terminals in South America which will probably obsolete our radio telephone links to South America. In terms of equipment this is a continuous process.

Our all solid state microwave equipment we brought out [2861] obsoletes tube equipment.

Our cross-bar switching Penta Conta cross-bar switching system obsoletes our step by step and our rotary systems. We are

working on two new electronic systems which will obsolete Penta Conta: Our L103 teleprinter obsoletes the old models.

We have a new teleprinter coming along that will obsolete that. One other one, we are pioneers in the tropo business which at least we thought at first was going to obsolete all line-of-sight links. In fact, it didn't.

Q. Did Mr. Geneen or anyone else in authority ever interfere with your undertaking a new technology in order to preserve ITT's present position in connection with products or services?

A. No.

Q. What conversations if any have you held with Mr. Geneen concerning ITT's cooperation with ABC on the technological front?

A. I think I mentioned he has a fetish on this coverage question, of bringing the coverage of ABC up to NBC and CBS. He has given us in the technical department the job of doing that. He is after me every couple of weeks about it in one form or another.

We have a fairly elaborate program in that direction. Is this what you meant in your question?

Q. Yes, sir. Have you discussed with Mr. Geneen any [2862] other areas outside of the UHF coverage whereby ITT's technological know-how would benefit ABC?

A. Yes. Well, it is contained in this memorandum of J-262 on this last page. I just briefly say in the area, I think in the general area of automation of the systems, we can help them a lot. My understanding is that they are somewhat retarded in the degree that they have modernized the system compared to NBC and CBS.

In classic communications, they spend between \$15 million and \$20 million a year on long lines communications. Here is one that I think if we go after, we can save 10 percent out of that.

Q. Mr. Cookson, what is the North American development center?

A. This is the center that we are planning and will encompass the ABC technical support group. I can elaborate.

Q. For how long a period of time has this been planned?

A. It is a year or 18 months. We have up to now dispersed our laboratories in North America. We are planning to pull that together in a central facility.

Q. In your conversations with Mr. Geneen, has reference ever been made to the lag of ABC technologically behind that of NBC and CBS?

A. Yes. This has been a common discussion among several of us.

[2863] Q. I am talking about Mr. Geneen specifically.

A. Yes, it has been discussed I am sure on many occasions.

Mr. COHN. Mr. Examiner, just one moment. I think I am expediting by taking a few moments here.

By Mr. COHN:

Q. You mentioned importation of UHF transmitters from Europe. Would that be normally attractive to ITT absent the ABC merger?

A. No, I don't believe so. I don't think there is enough of a market for us to do it.

Q. Mr. Cookson, do you have in front of you J-262?

A. Yes.

Q. There are listed on the last page, five separate items under H. Would any of those projects set forth there be undertaken by your department absent the ABC merger?

The five items on the last page?

A. Yes, some of them would.

Q. Which would and which would not?

A. Well, I would say that the direct broadcast of TV satellites from home I suspect we will be involved in that one way or the other when it comes along, now independent of what happens with ABC.

H-2. Well, we invented pulse code modulation. We have been looking at methods in the lab——

CHIEF HEARING EXAMINER. Can you tell us which would and [2864] which would not and then we will move along?

By Mr. COHN:

Q. Yes or no or any qualifications you want to make.

A. One and two, we would work on. Three, we wouldn't, four we wouldn't. I would say five, maybe, it is hard to tell.

Q. Mr. Cookson, what if any help would ITT give ABC in connection with the mobile operation for news?

A. In both.

Certainly in the case of our mobile satellite terminals, we could supply in some manner the know-how, the assistance of the terminals to do world-wide coverage on a world-wide basis of news events.

Also, we have a lot of different items of micro-miniaturized equipment which we could adapt to ABC requirements. We have a low light, miniature low light level, miniaturized TV camera, for example.

[2865] Q. What has ITT done in the field of facsimile or Videx?

A. We have developed a system for transmitting over a telephone line a picture with little lower quality than standard TV. We also have a hard copy printout to go with it. We have been discussing the possibility of using that with ABC.

Q. Have you been discussing with them the possibility of using any lasers?

A. Yes. We had a plan in our San Fernando Laboratory for using—one of the problems they have is to go from video tape to film. You can do that with a laser system to read directly from electrical signals onto color film. You don't have to do it in a vacuum.

There are certain technical advantages to it.

Q. Have there been discussions concerning the large screen three-dimensional television?

A. This is a project that Leonard Goldenson is interested in. We have analyzed and we have some different ideas than most people. We don't believe in the way to do it is with these glasses and binocular effect of the eyes like threading the needle.

We believe in a large screen approach. We believe we have a novel approach. Also we are looking at flat television screen, solid state.

Q. Is work proceeding in that direction?

A. It is in a study phase now.



[2866] Q. Mr. Cookson, my notes may not be complete but did you refer to ITT and its work in the teleprinter field when I asked you the question of what work ITT has done whereby it either makes obsolete or——

A. Yes, I mentioned that.

Q. Mr. Cookson, are you familiar with the concept that is commonly referred to as "Home Communications Centers"?

A. Yes, I am.

Q. Will you please explain for the record what your understanding of that concept as a philosophy is?

A. The concept is some sort of broadband system that comes in a household and so you can put in new and different terminal equipment than now exists.

For example, and you can have two-way systems; a good example of it is this picture phone that has been talked about where you can call up your neighbor and look at the picture. The question of shopping by telephone where you can look at the sales clerk; the question of billing, reading meters, burglar alarms.

There is a whole family of things that people talk about in this area.

Q. Is the technology basically fully known and shared at this particular time in what is known as the home communications center?

A. Yes, it is. It is mostly an economic problem.

[2867] Q. In your judgment if ITT wanted to, and I am not suggesting you did, if it wanted to could it retard the development of the home communications center?

A. No.

Q. In the event ITT wanted to, and I am not suggesting that it would, could ITT in your judgment retard in any way the satellite to home phenomenon?

A. No.

Mr. KESTENBAUM. Could I object to that. I don't understand the basis of the witness' understanding of the technical, economic industrial picture involved in each one of these questions that will advance or retard development.

CHIEF HEARING EXAMINER. Overruled.

The WITNESS. The answer is no.

By Mr. COHN:

Q. Mr. Cookson, did you attend a meeting on November 2, 1965 of ITT officials concerning CATV?

A. Yes, I did.

Q. Was there any reference made explicitly or implicitly of ABC at that meeting?

A. There was no reference to ABC that I recall.

Mr. COHN. Mr. Cookson, that is all I have. Thank you very much.

[2868]

REDIRECT EXAMINATION

By Mr. KESTENBAUM:

Q. Did the Jansky and Bailey Report ever go to ABC?

A. To my knowledge it didn't but I can't be sure that it didn't. To my knowledge it didn't.

Q. The work that you talked about on the UHF transmitter, are there other companies in the United States who have done that work and have introduced that product?

A. There are other UHF transmitters for sale. To my knowledge there is not another all solid state one similar to ours. We have two Klystrons and a traveling wave tube. The others are all soft.

Q. I believe you answered to Mr. Cohn that you would not be interested in that product absent the merger, in introducing that product in this country absent the merger.

A. That is correct. I gave my opinion on that. Actually that would be a commercial decision by the product line manager to introduce a product or not. In my opinion because it had never been done and had not been talked about we would not have introduced it.

Q. If the merger does not go through do you believe that product will stay on the market?

A. I think we will probably have made an advancement with Visual Electronics by then and it would have to stay on the market.

[2869] Q. Several other items that Mr. Cohn referred to are also items which are—let me make it more specific. An item like mobile ground stations, this is a product or an item which the ITT is trying to sell, is that correct?

A. That is right and we will continue to.

Q. You are trying to sell that with or without the merger?

A. Certainly, there is no question about it. You are talking about mobile ground satellite stations.

Q. Yes.

A. We certainly will, yes.

Q. You will make them available to any customer?

A. Anybody.

Q. If ABC were not part of your enterprise you would make it available to ABC?

A. That is right.

Q. Is that true about Videx?

A. We would make it available that is correct, yes.

Q. That would be true about a laser development if you achieve it?

A. We wouldn't spend that kind of money on that product.

Q. Are there other people working on that product, sir?

A. I don't really know if there are or not.

Q. Do you believe if ITT retired from that field that you would be retarding the development of a laser camera or [2870] whatever it was that you described?

A. It might be retarded because no one would have the big enough market to do it.

Q. You referred to ITT's invention of pulse code modulation. Am I wrong, my impression was that Bell Labs developed that?

A. We invented that.

Q. Were they involved in some of the early research then?

A. I assume they were. They made a lot of T-1 carriers that are pulse modulation.

Q. Did you do it first?

A. PCM is used for a lot of things. As far as the junction carrier you are referring to, the T-1 carrier, Bell introduced it here. The general PCM junction carrier is not widely used outside. We sell it now.

Q. When you say Bell introduced it did they put it into commercial use or is it just a technical development?

A. They put it in commercial use. The T-1 carrier is a big carrier system.

Q. Are other companies working on this three-dimensional television problem?

A. I don't know.

Q. Is that what is called holography?

A. No. The term strikes me but that is not what I am [2871] talking about. There are a number of different approaches to three dimensional television. As a matter of fact there were some crude things that have existed. We don't believe any of them will ever go anywhere, the ones that exist now.

Q. When you look at H-3, -4 and -5, and said these were not activities you would be engaged in apart from the merger you have not made any determination to engage in them one way or the other, have you, sir?

A. We haven't made a final decision that we can do anything that is useful in them. I think the combination of the incentive plus the fact that we can do it is what we would make a decision of whether we would go ahead or not.

Mr. COHN. Mr. Kestenbaum, may I make a suggestion that you referred to H-3, -4, -5. What is the document number?

Mr. KESTENBAUM. J-262, page 5.

The WITNESS. Remember, that item 5 I said "maybe". I am not sure of that one.

By Mr. KESTENBAUM:

Q. For that matter if as a result of the kind of case study you indicated earlier there were found to be a market for this kind of thing do you believe you would go into it without regard to the interests of another aspect of ITT's organization?

A. Under the conditions you stated if there was a good enough market and we could see it we would.

[2872] Q. To clarify one aspect of this market or commercial opportunity situation, you referred to the incentive you would have if ABC would become part of the organization.

If ABC would not be part of ITT it would constitute a market for each one of these items we have been talking about, would it not?

A. That is right, it would but it is a different situation because you gain two ways. If ABC gets some advantage out of it beyond what ITT gets in profit if they get any, there is an advantage of ABC and if ABC and ITT is the same company.

If there are separate companies you just do it in the marketplace. You sell the product and you pay off the R&D cost, and you make a profit and pay off the R&D cost.

Mr. KESTENBAUM. That is all.

#### RE-CROSS-EXAMINATION

By Mr. FITZPATRICK:

Q. Mr. Cookson, when you have an R&D project and you want to determine whether you should expend the money, you look to see whether or not you will be able to recoup the money invested through future sales of the hardware involved, is that a correct statement?

A. If it is a hardware project, yes.

Q. What other projects that you have? Aren't most of your projects hardware projects?

A. Well, you could be doing things, say, in a laboratory [2873] because you wanted to develop something and get a license, and license it to other people to build and make a profit through licensing fees, for example.

Q. You still would be looking for your profit in determining whether to go into it?

A. In the total sense, yes.

Q. Now when you have a need within the family of ITT for development of a certain product or a certain item such as assuming ABC was part of the ITT family, what criteria is then applied in determining whether you will expend the funds in R&D to reach the end that you want to accomplish?

A. I would have to say you would have to consider then the overall company benefit. If you had a product, for example, that would increase ABC's coverage by a million viewers, you might then—then you would have the incentive to develop it even if it did not look like it would be a profitable product on the open market.

You have to consider the overall case of the company.

Q. So the criteria there would be the overall benefit to the company and to the family of ITT?

A. The total, that is correct.

Q. You said at the November 2, 1966 meeting where CATV's were discussed, ABC was not mentioned.

Mr. COHN. You said '66. I think you meant '65.

[2874] By Mr. FITZPATRICK:

Q. '65.

A. ABC was never mentioned to my knowledge.

Q. When did you first learn of the ABC-ITT merger talks?

A. It is somewhere around the first of January of last year. I don't exactly—as a matter of fact, the first time I read it was in the newspaper and then I heard officially somehow but I don't remember. It was around the 1st of January, 1965, I would say——

Q. You mean '66?

A. '66. That is right.

Mr. FITZPATRICK. I have no other questions.

CHIEF HEARING EXAMINER. Is there anything further of the witness?

By Mr. COHN:

Q. Will you please tell us what is the date of the Jansky-Bailey Report to which you referred?

A. March 21, 1966.

Mr. COHN. Thank you very much, Mr. Cookson.

CHIEF HEARING EXAMINER. That will be all, sir.

[2889]

#### TESTIMONY OF HARVEY J. LEVIN

By Mr. TIERNEY:

Q. Professor Levin, will you look at your statement please on the very first page, the summary.

A. Yes.

Q. The first line.

Lower long-distance transmission [2890] costs can help facilitate entry of new television networks, as well as a fuller and wider dissemination of all networks of foreign and domestic news and comment.

Do I read that correctly?

A. Yes, sir.

Q. If it is within your knowledge would the matter of transmission cost have been a principal reason for the demise of the fourth television network in about the year 1955, the so-called Dumont Television Network?

A. I have heard it stated as such.

Q. Is it within your knowledge?

A. I am sorry. Is it within my knowledge?

I believe this was a factor. I believe it was an important factor, one of the two most important factors in their demise.

Q. You——

Mr. WHIPPLE. I move to strike the answer as not responsive. The question was is it within his knowledge.

The WITNESS. What is the basis of my knowledge?

Mr. WHIPPLE. The question was, is it a matter within his knowledge. He said he believes something or other.

Mr. GORDON. This is a proper answer. This is an expert here who studies this field extensively.

Mr. TIERNEY. Will you read the question again, Mr. Reporter. The last question.

[2891] (The record was read by the Reporter.)

CHIEF HEARING EXAMINER. Do you have any knowledge or opinion in that regard, sir?

The WITNESS. My opinion, I must confess I don't follow the meaning of knowledge here, my opinion is that transmission costs played a factor. I can indicate one of the sources of that knowledge.

CHIEF HEARING EXAMINER. Proceed.

The WITNESS. One of the sources of that knowledge was, if I do recall properly, one of the statements in the network study, report on the network broadcasting in the discussion of inter-connection charges, if my memory does not fail me on that.

I also had some contact with the DuMont Company at that time. I know this loomed very large in the thinking of their counsel at that time as to what their problem was. I could site those two sources.

By Mr. TIERNEY:

Q. Let me see if I can sharpen this a bit.

CHIEF HEARING EXAMINER. Proceed.

By Mr. TIERNEY:

Q. Dr. Levin, within your knowledge and within your expertise, is it a fact that the matter of transmission cost was a principal factor in the demise of the then fourth television network, is that correct?

[2892] A. Yes, it is.

[2902]

Q. Do you know whether ABC has now been unsold rather than sold on the idea of a private satellite system?

A. Whether they have now been unsold you ask?

Q. Yes.

CHIEF HEARING EXAMINER. If you know.

The WITNESS. I do not believe that they are unsold. [2903] If I read correctly their April 3rd statement they are still speaking of a private special purpose system. It might be run by a specialized nonprofit carrier, a joint venture representing the networks, but to my knowledge they are not now unsold.

By Mr. TIERNEY:

Q. I have just one more question.

From your knowledge of the market of space technology and space communications, the people who are in the market of space technology and space communications, would ITT and Hughes be competitors in that market?

Mr. GORDON. You mean as sellers or buyers? I don't quite understand.

Mr. TIERNEY. Sellers. They can't be competitors to buy, can they?

Mr. J. McKENNA. Mr. Examiner, I object. There is no foundation laid for this question. So far as I know this witness is not familiar with what Hughes produces and sells. If he is familiar he had better put it on the record before he answers the question. Nor am I aware that he is familiar with what ITT produces and sells in these areas.

CHIEF HEARING EXAMINER. What do you say, Mr. Tierney?

Mr. TIERNEY. I think the witness is fully knowledgeable of



the market place, of what companies are in the market of manufacturing, producing and servicing space vehicles, et cetera.

[2904] The WITNESS. May I answer?

Mr. COHN. No. Not until the Examiner has ruled.

Mr. TIERNEY. I am not asking him any technical knowledge. I am asking that which an economist may reply to, who operates in a market place, a given market. I ask him whether or not he knows this. If he knows let him say.

Mr. J. McKENNA. I think there is still no foundation laid. I think if Mr. Tierney wants this question asked he should first ask this witness to state on the record what Hughes produces and sells in this area. And then, second, he should ask him to state on the record what ITT sells and produces in this area.

CHIEF HEARING EXAMINER. I am going to sustain the objection to the question and permit counsel to go forward with an offer of proof through the witness himself to save time.

Mr. TIERNEY. Thank you.

By Mr. TIERNEY:

Q. Can you, Professor Levin, from your knowledge or from your experience as an expert in the field of economics, describe those industrial entities in the United States who operate in the market wherein space and space communication technology and equipment is marketed?

A. May I say, sir, both the companies you ask about operate in that market.

Q. They do?

[2905] A. Yes.

Q. You have knowledge of that?

A. Yes.

Mr. TIERNEY. I have no further questions.

CHIEF HEARING EXAMINER. Mr. McKenna?

By Mr. McKENNA:

Q. First of all, Dr. Levin, unless I misread or omitted something, I gather that there is nothing in this article which in your opinion would in any way do other than bestow the highest praise on ABC for its efforts in the satellite field?

A. In my paper?

Q. Yes.

A. Not the Fortune Article. I feel that ABC has played an enterprising role in the domestic satellite field and in the global.

Q. You know of no change in their attitude since the merger with ITT was announced on December 7, 1965?

A. If I may—

Mr. COHN. I object, Mr. Examiner. It is either yes or no.

Mr. GORDON. I think the witness can explain any answer.

CHIEF HEARING EXAMINER. Has any change, in your view, occurred since 1965 when the merger was first considered? That is the only question before you, sir.

[2906] The WITNESS. There is one change.

By Mr. J. McKenna:

Q. What is it, sir?

A. I think in reading the April 3d statement I found a lot less technical backup material and I understood that there was to be some. Somehow as a statement it didn't articulate the position—this is a nuance—I felt the way the earlier ones had. I wouldn't go beyond that statement. I could see no other change.

Q. What do you mean by a technical backup? Are you referring to reports by Hughes?

A. Yes, sir.

Q. Are you aware, Doctor, that it is possible that Hughes may have provided more detailed information to some other participant in the proceeding than they did to ABC?

A. I know, sir, that Hughes presented material both to ABC and the Ford Foundation in December and I believe in August. That I do know, sir. I believe there was additional material in the April filing of Ford from Hughes, although I do not recall at this moment.

Q. You have no information that leads you to believe that ABC refused anything from Hughes, have you?

A. I do not have any such information.

Q. So with that one exception, namely that the ABC filing did not contain as much technical information from Hughes [2907] as, let us say, the Ford Foundation filing contained, you know of no other change?

A. I found it more difficult to come on the clear-cut indorsement of a private ABC owned system but I think it was in there. I won't go beyond that.

[2956]

# TESTIMONY OF EILEEN SHANAHAN WAITS

By Mr. KESTENBAUM:

Q. Mrs. Shanahan, will you state your name and position for the record.

A. My full name is Eileen Shanahan Waits. I am professionally known by my maiden name, Eileen Shanahan. I am a reporter in the Washington Bureau of the New York Times.

Q. Have you been assigned to cover this proceeding, Mrs. Shanahan?

[2957] A. Yes.

Q. When were you assigned?

A. The first story I did on this was the Commission's decision of December 22 to approve the merger. I think I have covered every development since with one exception.

Q. Have you been contacted by any official or employee of the applicants concerning the nature or content of your stories or of the New York Times coverage of this proceeding?

A. Yes, I have.

Q. Could you describe those contacts and, if you would, try to relate that to the extent you can in terms of what was said to you and the contents of the conversations themselves.

A. You want all of them?

Q. Could you state roughly how many times the contact occurred.

A. There were five or six but several were very brief and routine.

Mr. WHIPPLE. May we ask Mrs. Shanahan to identify the approximate dates.

Mr. KESTENBAUM. I am sure she will.

The WITNESS. There are a couple of them that were very brief that I can't pinpoint in time. The more extended ones I can.

By Mr. KESTENBAUM:

Q. Why don't we discuss the substantial ones that are [2958] more significant for this proceeding.

A. I think I can take them in order.

I think the first that I recall was very brief and just consisted of a phone call from a representative of ITT. I no longer remember who he was who called me with a company statement in response to one of the developments in the case and simply read it to you.

In the course of that conversation he said something to the effect, "I expect to see that in the paper, high up in your story."

Q. You don't remember who that was?

A. I do not.

Q. When did you say you recollected that to have occurred?

A. I only recall that this was my first direct contact with anybody involved in this case. So, I am not sure just where in the proceedings this was.

Q. Sometime after December 22?

A. Yes.

The next one was on the night of February 1st which was the day or late in the day when the Commission issued its order to the Justice Department to produce its documents and information about who it would call to testify if the Commission reopened the proceedings.

That did not come out of the Commission until late in the [2959] day, around six or even later. I was still in my office around eight, when Mr. Gerrity, the Vice President for Public Relations of ITT and another man to whom he introduced me but whose name I do not recall now came to my office.

Mr. Gerrity had previously called me with the company's rather brief statement in response to this, but came around to, so he said, to give it to me so that I had a copy.

We got into a fairly lengthy conversation, I would estimate better than 20 minutes, maybe as much as half an hour. First of all, he said in a way I remember as being a little oblique and not quite direct.

Mr. WHIPPLE. I object to that.

Can't the witness stick to the facts without characterizing—

The WITNESS. Wait until you hear the rest of the sentence and maybe you won't mind.

He indirectly in some way asked me or indicated he would like to see what I had written. It was not a direct request, certainly not a demand. I responded that he knew that this was considered an improper thing to ask a reporter and he could buy a paper in the morning or his people in New York could buy one at 10 o'clock.

We then discussed the substance of the case for a few minutes. He asked me whether the Times was going to run the text of the Commission's order to the Justice Department. I [2960] told him that I thought he lacked perspective, that the Times ran the text of such things as Presidential Messages, and that was an interesting and important story but not that important.

He pursued the argument and said that this was very unusual. You all may recall that the Commission used some rather harsh language about the Justice Department in that order and he suggested that or said that this was very unusual for one Government agency to use such language about another Government agency and we ought to run the text.

I agreed with him that it was indeed unusual but pointed out to him that the Justice Department had used about equally harsh language about the FCC in its petition for reopening the case and that we had not run the text of that.

He insisted that the two things were quite different. I can no longer remember the argument because it didn't make any sense to me.

Finally, he said to me, "You mean you did not even recommend the use of text."

Mr. WHIPPLE. I did not get that.

The WITNESS. You mean you did not even recommend the use of the text on this.

By Mr. KESTENBAUM:

Q. Recommend to whom?

A. Presumably to my superior in Washington or directly to New York. This is common, a reporter working on a story [2961] sometimes does initiate the suggestion that the text be used. The tone was certainly accusatory and certainly nasty.

I said no, I had not recommended the text for the reasons I had just discussed. He badgered me again——

Mr. WHIPPLE. Mr. Examiner, I must object to these characterizations. Can't we just set the facts.

CHIEF HEARING EXAMINER. Can you avoid them as far as you can.

The WITNESS. He again asked in a way that seemed to me to indicate that I had done something wrong or incompetent, why I hadn't recommended the use of text, and finally got a little annoyed.

I said "Do you want to recommend the text to my editors, use my telephone."

That was the end of that part of the conversation. It continued and we discussed the case some more. In some fashion he, I forget exactly how it was introduced but he brought up, he asked me whether I had been following what had been happening to the price of the stock. My best recollection is that he was referring to both ABC and ITT stock although I am not clear on that point.

If I had been following what had been happening to the price. I said, "No, I didn't watch individual stock prices closely."

He described briefly what had been happening. I never [2962] made an independent check to see whether that description was correct. I don't remember now what he said really.

He asked me whether didn't I feel, I remember the question came affirmatively in that sense, didn't I feel that I had a responsibility to the shareholders who might lose money as a result of what I wrote.

I said, "No, I didn't. My responsibility was to find out the truth and print it."

The conversation still continued. He then after some other things inbetween I think, asked me whether I was aware that Commissioner Nicholas Johnson was working with some people

in Congress on legislation that would forbid any newspaper from owning any broadcast property, and what did I think the Times would think of that because he didn't mention it but for the record the Times owns radio stations.

I told him I couldn't imagine the Times would be overjoyed at this but at the same time I could not see such a bill getting through Congress if what he reported was true.

He then said, "I think this is some information that you ought to pass on to your publisher before you write anything further about Commissioner Johnson's opinions in anything."

That was about the end of it as I recall. I had had about enough. So I told him I had some work to do, which I did, and we parted.

[2963] By Mr. KESTENBAUM:

Q. Could you go on to the next episode?

A. The next episode was the day after the Justice Department filed its summary of the evidence. That was the 15th of February and the day I am referring to was the 16th.

Q. That is the document called Specification of Issues and Evidentiary Material?

A. I think that is correct. It is in any event the document which for the first time mentioned the famous \$100 million in five years which I featured prominently in my story.

In the middle of the morning, the following day, I received a phone call from Mr. John B. Horner, who is I believe the head of ITT's P.R. in Washington who right from the very first sentence or nearly the very first sentence accused me—

Mr. WHIPPLE. Mr. Examiner, I must object.

Can't she state what Mr. Horner said and what she said without characterizing what was done?

CHIEF HEARING EXAMINER. To the best of your recollection give his language.

Mr. FITZPATRICK. I think the tone of the voice is important. It ought to be set forth in the record.

Mr. GORDON. I agree. This is a trained observer who is being subjected not only to verbal demonstrations but there was a conduct.

[2964] CHIEF HEARING EXAMINER. Those things can be developed later but I think the language itself should be given first and then inflections and so forth may follow.

Proceed.

The WITNESS. Mr. Horner said that my story had been unfair. He used the word unfair repeatedly throughout the conversation.

By Mr. KESTENBAUM:

Q. This is on the telephone?

A. This is on the telephone. He said it was unfair—I forget whether I asked him why or whether he volunteered it—because with respect to the \$100 million cash throw-off in five years that there was no story, that I should not have written a story, that is the implication of that, there is no story is a newspaper phrase meaning there is no point in covering this because it is not news—that there was no story because the companies had answered this charge in the September hearings.

I told him that I thought it was a story and obviously my editors thought it was a story inasmuch as they put it on page 1.

He then went on to say that I had been unfair or the story was unfair because I had said down in the story that if the Commission refused to reopen the proceeding the Justice Department was expected to seek a court order forcing them to.

[2965] He said that this was unfair because the Justice Department had issued a statement saying that it would not go to court.

I said, "Really, I have not seen such statement; when was it issued and who by and what exactly did it say."

He said, "I have a copy right here" and he read it to me. It did not quite say what he had initially represented it as saying.

What it said in effect—I don't have that document—that the Department did issue a statement which said that no one in the Department—that the Department had not decided what it would do if the Commission refused to reopen the hearing, would not make such a decision until a decision by the Commission had been made and no one authorized to speak for the Department had said that a decision had been made



which is a little different from saying they said they wouldn't do it.

Anyhow, I pointed out to him that I thought he had improperly characterized it.

He said nevertheless my statement in the paper was wrong and how dare I say—I am not sure he used that term—that Justice was expected to seek a court order in the face of this statement and I told him I had my sources and they were good sources and I believe what I had written was true.

He kept using the term unfair throughout the discussion on the point. We went back and forth on this question of the [2966] fairness of my statement that Justice was expected to go into court until finally he said, "Your coverage of this story has been unfair right from the start," or "all the way through," or something like that.

At which point I became very angry. I am told I shouted at him. I am told by colleagues in the office who heard it. And said that that was an insult that perhaps any reporter could slip one biased story through any set of editors, however brilliant.

But that if he said my stories had been repeatedly and consistently unfair, that was not just a charge against me, it was a charge against the editors of the New York Times and I would not listen to it and I hung up the phone.

That is the end of that episode.

Q. You know Mr. Horner?

A. I had never previously met him.

Q. Have you met him?

A. I have met him since.

Q. Was he the gentleman who accompanied Mr. Gerrity?

A. No, he was not. I think that was someone from New York but I don't know for sure.

Q. You say you have one more?

A. There was one more since these hearings began. Whatever day it was that Mr. Cohn requested that Mr. Charbonnier be excluded from the room under the previously established [2967] precedent that future witnesses would be excluded from the room, that happened right at the opening of the hearing.

I was a little late coming in that morning and in the ante-room in the other building on my way in saw Mr. Horner who told me what had happened; about the exclusion of Mr. Charbonnier.

I thanked him for filling me in on it and he said, "And I expect to see headlines just as big on this one as on what happened the other day," referring of course to what happened the first day of the hearings when the charge was made that ITT was taking notes out to future witnesses.

And which was the lead of my story and also the Washington Post story the following morning.

I said to him——

Mr. WHIPPLE. I move that that reference be struck. That is a characterization.

Mr. KESTENBAUM. There is no characterization there.

Mr. WHIPPLE. Mr. Kestenbaum, may I finish.

CHIEF HEARING EXAMINER. Proceed.

Mr. WHIPPLE. It is a characterization of what happened. Whatever Mrs. Shanahan reported and what was in the Washington Post speaks for itself.

The WITNESS. Lead is the newspaper word which means the first paragraph on which the headline is based.

CHIEF HEARING EXAMINER. I move to strike the [2968] characterization.

Mr. KESTENBAUM. Is that a characterization when she says that was the first paragraph of her story and it was the first paragraph of the Washington story?

CHIEF HEARING EXAMINER. The ruling will stand. Proceed.

The WITNESS. In any event, I told him that obviously I would check what he told me, thanked him for tipping me off and if the two episodes were comparable they would take comparable headlines.

He again said, "I expect to see headlines just as big."

By Mr. KESTENBAUM:

Q. I think here I may have to interrupt to ask you about his tone. Was his tone jocular or tell me what his tone was when he made that statement.

A. I would say it was insistent and nasty. I checked with Mr. Cohn and with the hearing examiner as to what had happened. On the basis of what both of them—and also with the reporters who had been in the room—and on the basis of that decided that they were not comparable and while I covered the matter in my story I did not make it the lead, that is the first paragraph.

That is about all.

[2969]

By Mr. FITZPATRICK:

Q. Mrs. Shanahan, you testified that with respect to the first contact you had a telephone call from an ITT official. I believe you stated that he stated to you that, "I expect to see that in the paper high up in your story."

Did he tell you what it was he expected to see high up in the story?

A. He meant the statement he had just given me.

Q. Which was what?

A. I would say I can't remember exactly which point this was. ITT and ABC both throughout the events that led up to this proceeding have commonly issued rather short statements or comments on the various developments, usually no more than two or three sentences each. This is what he was referring to.

Q. Did he read to you over a telephone the "P.R." release?

A. That is correct.

Q. Is that what he was referring to when he said he expected to see it?

A. That is correct.

Q. When Mr. Gerrity visited you on the night of February 1, had you known Mr. Gerrity before that?

[2970] A. No.

Q. This was your first contact with him?

A. Unless he was the man who called me earlier, which I am not sure.

Q. Do you know Mr. Gerrity's full name?

A. E. J., I think, isn't it, Jr.

Q. I don't know. That is why I am asking you.

A. He is a Senior Vice President of ITT. It is my understanding that he is the——

Mr. KESTENBAUM. Edward J. Gerrity, Jr., according to J-331, Mr. Fitzpatrick.

By Mr. FITZPATRICK:

Q. How many years have you been with the New York Times?

A. It will be five in the fall.

Q. How often in your reportorial experience have you experienced this type of contact by officials of a company when the subject matter involved their own interest?

A. The only episode in any way comparable that I can think of since I have been on the Times, there was one. There is relatively little of this on the Times because the Times has a widespread and well-deserved reputation for resisting pressures of this kind and most people don't try it.

Q. Do they have a motto? "All the news that is fit to print."

A. That is right.

[2971] Q. Do you try to follow that motor?

A. Certainly.

\* \* \* \*

By Mr. WHIPPLE:

Q. I do want to clarify a few things in the interest of just setting the record straight.

These various conversations to which you have testified under Mr. Kestenbaum's examination about the representative of ITT, did you make any notes of these conversations at the time?

A. No, I did not.

Q. Did you ever report these conversations to any of your superiors?

A. Yes, I did.

Q. To whom did you report them?

A. I reported them to Mr. Robert H. Phelps, who is my immediate superior, the news editor of the Washington Bureau and reported them to him as they occurred, and after the second one I reported everything that happened to date to Mr. Thomas E. Mulaney, the financial editor of the Times who is not [2972] technically my superior but in practical effect—

Q. He is in New York, isn't he?

A. That is right.

Q. What did you say to Mr. Mulaney and what did he say to you?

A. Basically I called him because I had been so upset by this that I wondered whether ITT had a reputation for being this way all the time. I at that time did not know of the things that I have since heard happened to other reports in Washington.

Mr. WHIPPLE. May I just clarify one thing.

I asked here what she said to Mr. Mulaney and what Mr. Mulaney said to her.

Mr. FITZPATRICK. The question was why she called Mr. Mulaney.

CHIEF HEARING EXAMINER. Do you withdraw your former question?

Mr. WHIPPLE. No. The record will show I asked what did she say to Mr. Mulaney and what did Mr. Mulaney say to her.

CHIEF HEARING EXAMINER. I am sure the witness understands the question.

Proceed.

The WITNESS. I had never before had any dealings of any sort with ITT. I wanted basically to find out whether they had a reputation for this kind of thing.

[2973] By Mr. WHIPPLE:

Q. What did you ask Mr. Mulaney and I asked him just that.

A. I said I have had a lot of trouble with ITT. Does that happen all the time with ITT. He said no. By and large their relations with ITT have been okay.

Q. Did he say I can't understand this. My experiences have been just to the opposite or words to that effect; I want you to search your recollection now.

A. He may have said something. I don't remember his having said I can't understand that but I am not prepared to say he didn't.

Q. This would be consistent with the tone of his comments to you I take it?

A. Yes, it would.

Mr. WHIPPLE. Thank you.

[2976] \* \* \* \*

Q. Mrs. Shanahan, I take it that it goes almost without saying that your objective is to have objective and adequate coverage?

A. Yes, sir.

Q. Do you consider it proper if a company or an individual calls you in order to present what they consider to be additional facts which in their opinion would hopefully make the story more complete?

A. Of course, but there is a right way and a wrong way to do anything.

Q. I just asked you whether this isn't in your judgment a proper thing for someone to do to call up a reporter and say here are some additional facts I would like you to know about it.

A. Certainly that is proper.

Q. You are interested in reporting both sides of the [2977] story fairly as any good reporter is?

A. That is the basic canon of my business.

Q. I am going to ask you, Mrs. Shanahan, you testified about a conversation having to do with a statement by the Department of Justice about not going to court. Do you remember that?

A. Going to court, yes.

Q. You said I think Mr. Horner mentioned this to you and you had not recalled seeing the matter.

Mr. KESTENBAUM. Seeing what?

Mr. WHIPPLE. Seeing the statements from the Department of Justice.

By Mr. WHIPPLE:

Q. I am going to ask you what contact you have had with representatives of the Department of Justice, first of all since this hearing started on April 10.

Mr. KESTENBAUM. Could I have that explained, what the germaneness of this inquiry is, sir.

[2978] CHIEF HEARING EXAMINER. What do you say, Mr. Whipple?

Mr. WHIPPLE. Yes, I will be glad to, Mr. Examiner. It seems to me as a result of the record yesterday and Mr. Kestenbaum's characterization, and I am referring to Page 2812 of the record, Mr. Examiner, where he said he wanted to call Mrs. Shanahan and others who were allegedly the recipients of these activities or these alleged pressures, it seems to me that we are thus accused of bringing to bear pressures.

It seems to me we are entitled to show that we were interested in bringing out the accurate facts and interested in getting a four-sided story. It seems to me we are, therefore entitled to show what contact the Department of Justice may have had with Mrs. Shanahan and other reports in the interest of ascertaining whether they may not have been talking to the reporters with a view of reflecting the Government's side of the case in the papers.

I think it is an appropriate line of inquiry.

CHIEF HEARING EXAMINER. I am afraid I can't agree with you. The lady has testified about conversations she has had with representatives of ITT. She is here for cross-examination. What may have occurred between herself and Justice had nothing to do with it. I will sustain the objection.

Mr. WHIPPLE. I would like to make a proffer of proof for the record.

Mr. KESTENBAUM. May I correct Mr. Whipple's description [2979] of my statement?

I used the word "alleged" or "asserted" throughout the statement he read. So far as I knew at the time, what I was trying to do was characterize the Wall Street Journal story which led to this entire line of inquiry.

CHIEF HEARING EXAMINER. Mr. Whipple, do you know what the witness will testify to if permitted to do so?

Mr. WHIPPLE. Some of my colleagues have observed conversations of some length between representatives of the Department of Justice and some reporters during the course of this proceeding.

Mr. KESTENBAUM. I object to this statement.

CHIEF HEARING EXAMINER. I am afraid, Mr. Whipple, unless you can tell us positively what this witness would testify to if permitted to do so, I can't allow you to go forward.

Mr. WHIPPLE. This witness referred to a source in the Department of Justice during her direct testimony.

Mr. GORDON. She did not. She said sources she regarded as reliable.

CHIEF HEARING EXAMINER. I sustain the objection.

Mr. WHIPPLE. I would like to make the witness my own.

CHIEF HEARING EXAMINER. I can't allow you to go forward on an offer of proof.

Mr. WHIPPLE. Mr. Examiner, I am prepared to make the witness my own and take that risk and ask her what her sources [2980] have been and what conversations she has had with the Department of Justice with respect to the very matter before the Commission.

Mr. KESTENBAUM. Mr. Examiner, I have to object to that. Mrs. Shanahan is a reporter. I presume she has contact with a Department whenever a news story that comes up involves the Department.

I presume that between December and to date, she has talked to people in the Department on many subjects. I see no reason to get into this line of inquiry.

CHIEF HEARING EXAMINER. I think as part of your direct case, Mr. Whipple you should feel free to call the lady back to the stand. But if your cross-examination is concluded and apparently it is——

The WITNESS. Mr. Examiner, is it proper for me to ask a question?

CHIEF HEARING EXAMINER. Not at this time.

Mr. WHIPPLE. She talked about the sources which underlay the story she wrote about the case. I submit I am entitled to inquire the extent to which those sources included conversations



with representatives of the Department of Justice who are in a litigating capacity in this matter.

I think this goes to the fundamental fairness of the hearing we are having here. The Commission has mandated as people have frequently said that there be a full record. These witnesses are being called in an effort apparently to show [2981] that ITT was doing something questionable with respect to the press. I think I am entitled to show and I urge this upon you, sir, that—I am not questioning the impropriety of this but I think I am entitled to show as a fact that the Department of Justice has had conversations which I won't characterize extensive or otherwise with Mrs. Shanahan and other people of the press.

I think this bears directly on the evidence that ITT has made in an effort to get two-sided coverage.

CHIEF HEARING EXAMINER. Mr. Fitzpatrick.

Mr. FITZPATRICK. I have no information with respect to the allegations that Mr. Whipple has made either pro or con.

However one thing is clear. We have an applicant before the Commission here whose behavior might be in question. This witness has not been asked to testify concerning her sources of information.

She has been asked to testify as to specific conversations with officials of ITT. I think everybody in this hearing room is well aware of the code of the newspaper profession with respect to sources of information and if the attempt is being made to embarrass Mrs. Shanahan, I don't think that is the reason for this hearing.

Mr. WHIPPLE. I am not trying to embarrass Mrs. Shanahan.

Mr. FITZPATRICK. May I complete my statement, Mr. Whipple, please?

[2982] CHIEF HEARING EXAMINER. Proceed, sir.

Mr. FITZPATRICK. I thought we had some ground rules.

So that I don't believe that the present state of this record, either makes relevant or material the information that Mr. Whipple is presently attempting to elicit from this witness.

Her testimony has been limited to specific conversations with members of the ITT organization who initiated the conversa-

tions with her. She was not utilizing them as a source of information.

She was not attempting to find out anything. They called her and made reference to the coverage she was making in this hearing. I think that is the only issue we have here presently.

CHIEF HEARING EXAMINER. Finally, do you have any further argument, Mr. Whipple?

Mr. WHIPPLE. Yes, I do feel very strongly, sir, that the Department of Justice having put this issue right before you, sir, and right before the Commission, that we are entitled to show and no way in an effort to embarrass Mrs. Shanahan with her sources, I think we are entitled to show the nature and extent that the lawyers in the Department of Justice not only after this hearing had started, but beforehand, have had in giving information to Mrs. Shanahan and other reporters because it was on the basis of the stories written that the people in ITT apparently felt that they wanted to get further facts before the reporters in the interest of accuracy.

[2983] CHIEF HEARING EXAMINER. I am afraid I have to disagree with you, sir.

The request is denied. If you have no further cross-examination——

Mr. WHIPPLE. Yes, sir, I do if I may continue.

CHIEF HEARING EXAMINER. Proceed.

Mr. WHIPPLE. I will try to keep this within reasonable limits as I always have, Mr. Examiner, since this proceeding began.

CHIEF HEARING EXAMINER. Very well.

Mr. KESTENBAUM. Mr. Examiner, may I make one thing clear for the record? I agree with your Honor's ruling wholeheartedly but I am confident if the line of inquiry had gone forward, the imputations which Mr. Whipple has attempted to insert in the record by his own testimony would have been proved to be absolutely unfounded and utterly without any basis whatever in fact.

Mr. WHIPPLE. I would like to ask Mr. Kestenbaum if he did not hold a ten minute conversation with the press following the hearing on Monday, the 10th?

CHIEF HEARING EXAMINER. I will ask, direct counsel to proceed with the cross-examination.

Mr. WHIPPLE. Could I have on the record Mr. Kestenbaum's answer to that question? He has made a claim that nothing would come out of my line of inquiry.

[2984] CHIEF HEARING EXAMINER. The statement is stricken.

By Mr. WHIPPLE:

Q. Now, Mrs. Shanahan, with respect to the statement Mr. Horner made to you regarding a statement that he said he had received from a Department of Justice representative——

A. He did not say he had received it. He said they had issued it, which wasn't true.

Q. That is all he said, they had issued it? He didn't say they had received it?

A. He said they had issued it. I had not received it, I checked the Justice Department Information Office and discovered they had not issued such a statement publically. It had been transmitted to I think by telegram to Mr. Gerrity in New York and it is my understanding or I don't know of my own personal knowledge, that ITT subsequently made it public in New York, but Justice did not issue it.

Q. Whom did you talk to in Justice about this?

A. Mr. Sessions.

Q. What is Mr. Sessions post in the Department?

A. Well, I don't know the exact title but he is the chief of their public information office.

Q. Did he tell you whether or not he had any objection to your using this particular statement for lack of a better word?

A. I don't understand the question.

[2985] Q. When you talked to him, you say you ascertained that he had in fact sent a telegram, is that correct?

A. Yes.

Q. Although it was not a formal statement?

A. It was not a statement that the Department itself made public.

Q. Irrespective of whether or not it was a statement that the Department itself made public, did he or did he not tell you whether he had any objection to your using the statement?

A. It didn't come up.

Q. It didn't come up in the conversation.

Mr. KESTENBAUM. Could I have clarified when that conversation was?

Mr. WHIPPLE. Mrs. Shanahan, suppose you tell us to the best of your recollection when it was.

The WITNESS. My conversation with Mr. Sessions. Is that the question?

By Mr. WHIPPLE:

Q. Yes.

A. It was on the 16th of February right after Mr. Horner's phone call to me.

Q. Thank you for fixing the date.

Did you ask Mr. Sessions whether the Department had any objections to this wire statement being made public?

A. No, I did not.

[2986] Q. Did you ask him what the text of the wire statement was?

A. No, I did not.

Q. He didn't tell you.

A. We discussed it in general terms to the point where I don't remember what I said or what he said but we both knew what we were talking about.

Mr. WHIPPLE. Mr. Examiner, I am going to offer for the record the telegram from Mr. Sessions which has been referred to inasmuch as it came out during the examination of Mrs. Shanahan.

I had some copies made overnight. I will hand them around. I have lost track of the J numbers. Maybe somebody can help me out.

Mr. KESTENBAUM. Make that AR number.

Mr. WHIPPLE. I have lost track of them, too.

Mr. J. McKENNA. AR-59.

By Mr. WHIPPLE:

Q. Mrs. Shanahan, you have covered these hearings substantially since the beginning, have you not?

A. That is correct, up until yesterday afternoon.

Q. During the course of these hearings, you said you did meet Mr. Horner, is that right?

A. That is correct.

Q. You had known Mr. Gerrity beforehand?

[2987] A. I met him the night he came to my office.

Q. Do you recall that during the testimony of Mr. Goldenson, which I think was last Thursday, you left the hearing at one point and you asked Mr. Gerrity if he was going to be there to let you know if anything important occurred during your absence?

A. That is correct. I would like to state the reason why I did that.

Q. You can state the reason as far as I am concerned.

A. In terms of why I selected him. You were engaged in redirect examination at that time.

Q. I don't know that I was but somebody was.

A. Your team, anyway. I, therefore, assumed that if any telling points were made, they would be on the ITT side of the case and, therefore, I figured—

Q. Thank you for your compliment.

A. And I thought he would be an accurate reporter on that aspect. If the Justice Department had been testifying, I would have asked someone else to do it.

Q. You talked to Mr. Gerrity. When you came back to the room, what did you say to him and what did he say to you?

A. Wait a minute. I remember there was a point I had been waiting to get cleared up in cross-examination or in redirect. It was something—it was an inconsistency in the testimony.

[2988] I can't remember what it was now but something that Mr. Goldenson said, there was an inconsistency I had spotted compared to the previous testimony.

I had assumed that this inconsistency, that attempts would be made to clear it up when you all got to redirect examination. I came back into the room and he beckoned me, I believe, and told me that the point just had been raised about this inconsistency—I know what it was.

It had to do with the question of whether ABC had ever given earnings projections to ITT. Mr. Goldenson's testimony

seemed to conflict with some of the earlier testimony of ITT witnesses.

Q. I don't think that is quite right.

CHIEF HEARING EXAMINER. Strike that out. Now, Mr. Whipple, we can't have interruptions or comments on the testimony.

Mr. WHIPPLE. I move to strike that testimony. I asked her what she said to Mr. Gerrity and what he said to her.

Mr. GORDON. He said he would welcome her explanations. That is what she is trying to do.

The WITNESS. Mr. Gerrity beckoned me and mentioned that in the redirect examination, you or whoever was doing it had raised this question and had gotten an answer. He detailed to me what the answer was. I said something to him to the effect, "Oh, darn it, that is the thing I had been sitting [2989] here and waiting for all afternoon because I had been certain it would come up."

By Mr. WHIPPLE:

Q. Did you thank him?

A. I am sure I did. I hope I did.

Q. Later on——

A. I might add if I may, that I did not write what I wrote solely on the basis of what he told me. I wouldn't do that.

Q. Later that day, do you recall that a professor Hill testified?

A. Yes, I did.

Q. Did the Department of Justice hand you a copy of Professor Hill's statement before he took the stand?

A. I did not stay for Professor Hill's testimony. I had another engagement. After ascertaining that the UPI man was going to stay, so informed my office and asked them to watch for the UPI copy if it had something that seemed relevant.

Q. Do you know, Mrs. Shanahan, were you told whether or not the Department of Justice representatives handed to the press before Professor Hill took the stand a copy of Professor Hill's statement?

Mr. KESTENBAUM. I object to the question.

CHIEF HEARING EXAMINER. The question is irrelevant and the objection is sustained.

[2990] Mr. WHIPPLE. This bears on the question of fairness. This is fundamental due process.

CHIEF HEARING EXAMINER. The ruling will stand. You have an exception.

Mr. WHIPPLE. I do want to note a strong exception in the record on your ruling which prevents me from going into such conversations that the Department of Justice may have had with representatives of the press, A, since this hearing started, and, B, in the recent past before the hearing began.

CHIEF HEARING EXAMINER. You may have your exception.

Mr. WHIPPLE. I believe I should offer an "AR" document, the telegram to which Mr. Sessions's telegram is a reply.

CHIEF HEARING EXAMINER. Very well.

Mr. WHIPPLE. This is AR-60.

CHIEF HEARING EXAMINER. AR-60 will be admitted into the record at this time.

(The documents referred to were marked for identification as Exhibits AR-59 and AR-60 and received into evidence.)

Mr. WHIPPLE. May I ask one more question while that document is being marked and then I will temporarily suspend until the Government has had its second round.

By Mr. WHIPPLE:

Q. Mrs. Shanahan, you have been in the newspaper game a long time as you have testified and I know you have an excellent reputation. I would just like to ask you, if you can tell us, how many times, say a week, do you get phone calls from people who want to talk to you about a story that you are working on or a story that you may plan to work on?

Calls outside the Times organization.

A. I would say I receive such phone calls, initiated by the outsiders, it would average better than one a day.

Mr. WHIPPLE. Nothing further for the time being, Mr. Examiner.

CHIEF HEARING EXAMINER. Very well, sir. Now, we have had complete testimony from the lady, direct and cross-examination. I wonder if there are any minor matters to be cleared up.

Mr. KESTENBAUM. There is only one minor matter. At one point Mrs. Shanahan was asked whether she had or had not

protested against the tone or the manner of the presentation to her by Mr. Gerrity on the night of February 1 and I believe the witness said she would like to explain.

I would like to hear her explain.

CHIEF HEARING EXAMINER. She may.

The WITNESS. I was trying to avoid getting into a real fight. I prefer not to have angry exchanges with people. So, though I considered some of the things he said pretty outrageous, I let it pass.

[2992] By Mr. KESTENBAUM:

Q. Did you bring the conversation to an end?

A. I did.

Q. Thank you.

CHIEF HEARING EXAMINER. Mr. Fitzpatrick.

#### RECROSS-EXAMINATION

By Mr. FITZPATRICK:

Q. Mrs. Shanahan, directing your attention to AR-59 and AR-60, and more particularly to the dates of those telegrams, do you know the dates of those telegrams?

A. Yes.

Q. February 6 and February 7?

A. That is right.

Q. You testified that your conversation with Mr. Horner was on the 16th, is that correct?

A. I think that is correct.

Q. When did you call Mr. Sessions?

A. The same day, right after I talked to Mr. Horner on the 16th.

Q. The telegram of Mr. Sessions had been sent some ten days before that?

A. Right. I had never seen it. Mr. Horner had challenged me about my lack of knowledge of it. I wanted to find out why I had not seen it. Actually, I called in the anticipation that Justice had put it out and there had been some kind of slip [2993] up.

That is the reason that neither my office or Sessions and that is the reason I had not gotten it. I wanted to trace that. To my surprise I discovered that Justice had never actually issued it.



Mr. FITZPATRICK. I have no other questions.

By Mr. J. McKENNA:

Q. Mrs. Shanahan, I have before me a book entitled "Responsibility in Mass Communication." The author is Wilbur Schramm. I am going to read you a brief paragraph which appears in pages 161, and 162.

I would like to ask you whether you agree with it.

There is nothing against having handouts carefully prepared to present the affairs of an organization in the best light. There is nothing against having a press or public relations officer to prevent public relations mistakes. There is nothing against having a press or public relations officer to protect some of the time of a busy executive, because otherwise the communications system might break down under the shear overload of communication imposed on the top man. Moreover, news gatherers usually frankly admit that they could hardly do their job today without the help of press officers because the job of news coverage has become so enormous and so complex. Indeed, the press officer or the news bureau often performs the service of a middleman or translator, putting the news in [2994] terms the reporter and his audience can understand and answering the questions the reporter asks in order to clarify his own understanding of the item.

Would you agree with that statement?

A. Yes, I do, sir.

Q. Thank you.

CHIEF HEARING EXAMINER. Mr. Cohn?

By Mr. WHIPPLE:

Q. Will you identify Wilbur Schramm for the record?

A. Me?

Q. Yes.

A. I do not know him.

Q. Mrs. Shanahan, you have before you AR-59, which is Mr. Sessions' telegram, do you?

A. Yes.

Q. Do you see that was dated February 7? Do you know when that was released by ITT to the press?

A. I do not.

Q. I will state for the record——

Mr. KESTENBAUM. I object.

Mr. WHIPPLE. Let the record show it was released February 8.

By Mr. WHIPPLE:

Q. The article that Mr. Horner——

Mr. KESTENBAUM. Mr. Examiner. I have to object to Mr. [2995] Whipple's testifying.

Mr. WHIPPLE. I am stating it for the record.

CHIEF HEARING EXAMINER. Let one speak for the record at a time, please. We will have chaos here otherwise. If counsel will vouch for the fact that it was released on the 8th, I will accept it in the record.

Mr. WHIPPLE. Thank you, sir.

By Mr. WHIPPLE:

Q. The story that you wrote on the date of February 16, do you recall, contained a paragraph stating "If the Commission reaffirms its approval of the merger without further hearings, the Justice Department is expected to seek a court order reopening the case"?

A. That is exactly the paragraph I had been referring to.

Q. That is the one you were discussing with us. I think you said something about the Sessions' telegram during your direct examination. You now have had a chance to look at it. Do you think that the statement in your article is consistent or not with the Sessions' telegram?

[2996] Mr. KESTENBAUM. I object to that, Mr. Examiner. She has already testified on this point. What I believe she said, she described her other sources of information which she relied upon.

Mr. WHIPPLE. She also characterized Sessions telegram. I am suggesting that with all the things Mrs. Shanahan has to do, her characterization was not quite correct.

CHIEF HEARING EXAMINER. Let her complete her answer.

By Mr. WHIPPLE:

Q. Having had a chance to examine the Sessions telegram, AR-59, do you think that is consistent or inconsistent with the statement in your story about what the Department of Justice was expected to do?

A. I am not sure I could characterize it precisely as consistent or inconsistent. I think it is perfectly possible to report factually what I reported, which I didn't say the Department had decided. I said the Department is expected—is that not my word in the story?

Q. It certainly is.

A. The telegram says merely we have not decided. I suggest that the phrase "is expected" involves conversations with people whose informed judgment was that the Department probably would decide to go to court.

Q. Were those conversations with people in the anti-trust division of the Department of Justice?

[2997] A. Mr. Whipple, you know you are getting into a question that no reporter will ever answer.

Q. I am not asking you to identify people. I am asking you to state generally.

Mr. GORDON. He stated he would not go into the sources of information. Now he is opening up a new field.

CHIEF HEARING EXAMINER. I am going to terminate this examination.

The lady is excused from the stand. Thank you very much.  
(Witness excused.)

Whereupon,

Stephen M. Aug was called as a witness and, after being first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

By Mr. KESTENBAUM:

Q. Would you state your full name and position for the record, sir?

A. My name is Stephen M. Aug. I am a newsman for Associated Press.

Q. Have you been assigned to cover this proceeding?

A. Yes.

Q. Have you been contacted by an officer or emissary of the applicant concerning the nature and content of your [2998] stories, any of your stories or your wire service stories concerning this proceeding?

A. Yes, I have.

Q. Could you describe for us those contacts?

A. The first one was on February 1st, after the Commission ordered a delay in the merger pending a determination of whether to allow the Justice Department to give its case. We handled the story as a bulletin because of its importance. I was dictating the story from a telephone here in the Commission. I suppose I had gotten past a few paragraphs when one of our people on our desk at the office interrupted and said—

Q. Which office is this?

A. Our AP office.

Q. Here?

A. Here in Washington.

And said that he had received a call from our desk in New York that ABC had complained that the first paragraph of the story was wrong. He said—well, the story had said that the FCC ordered a delay in the merger—

Mr. WHIPPLE. I will object on the grounds of hearsay.

CHIEF HEARING EXAMINER. Mr. Kestenbaum.

Mr. KESTENBAUM. Mr. Examiner, I think in order to get a coherent story, I think it would be appropriate for you, especially since this is an administrative proceeding, to [2999] allow the witness to tell the story and to the extent that he is describing hearsay I think that will just go to the weight of it. It will be difficult for him to tell the story without recounting it the way it occurred insofar as he has knowledge.

Mr. WHIPPLE. I submit he can tell the story under the traditional rules of examination without proliferating on the record a mass of hearsay.

CHIEF HEARING EXAMINER. I don't think he is going to delve into a mass of hearsay. I think a certain amount of hearsay will be necessary so that the whole testimony will be coherent. I overrule the objection.

By Mr. KESTENBAUM:

Q. What was the inquiry addressed to you by your desk?

A. The desk told me that ABC had said that they were under the impression that the Commission had merely suggested that the merger be delayed and that we were reporting that it had been ordered delayed.

Q. What action did you take as a result of that conversation?

A. I told the desk that I had the order in my hands, that the Commission had ordered it and had not suggested it. I told them that under no conditions should they change.

Q. Was any change made in that story?

A. No.

[3000] Q. Was there another episode that you wish to recount?

A. You mean on the same night?

Q. Well, any other time.

A. I returned to the office later. I was again told that our desk in New York had called and made the same inquiry regarding the story. At that time I showed them the Commission order and told them it was ordered and not suggested. The second time I was contacted was last week. I couldn't give you—it was following part of Mr. Kenmore's testimony in which he mentioned that ITT had based its decision to merge to a good extent on the \$100 million which ABC would throw off over a period of four years.

I wrote my story saying essentially that. I was later called by two public relations officials of ITT who told me that my story, as it stood, was not complete.

Q. Will you identify them, sir?

A. One of them was Ed Gerrity and the other was Jack Horner.

Q. How did they call you? Was it a telephone conversation?

A. Yes.

Q. At home?

A. Yes. And they said that the story was not complete as it was, that I should have mentioned the fact that later on ITT realized that these figures were, as I recall, not [3001] accurate.

Q. You are trying to recall their statement, sir?

A. Yes. I told them that my notes didn't show this had been given in the testimony but if they could produce a transcript to back up their statement I would be happy to change my story. They indicated that the transcript would be ready between 8 and 9 that evening. I phoned my office, told whoever was on the desk about the situation and that if ITT should come in with the transcript that proved to their satisfaction that this material should be added to the story that they should go ahead and do it. This, of course, was done by our desk later that evening.

Q. These were the two episodes you had in relation to contacts or inquiries from officials or employees of the applicant, is that correct?

A. Yes.

MR. KESTENBAUM. Thank you. That is all.

CHIEF HEARING EXAMINER. Mr. Fitzpatrick?

#### CROSS-EXAMINATION

By MR. FITZPATRICK:

Q. You received last week two separate calls, one from Mr. Gerrity and one from Mr. Horner, or were they on the phone together?

A. I don't recall. They might have been on the phone together. Most of the conversation was Mr. Gerrity.

[3002] Q. He had said you had overlooked some pertinent testimony in the record?

A. That is correct.

Q. You agreed that if the record disclosed this testimony that it would go on the AP wire?

A. It should be in the story, yes.

Q. You made arrangements to have the ITT people bring the transcript down so that somebody at AP could decide whether it should go on the wire?

A. Yes.

Q. They did bring the transcript down?

A. That is right.

Q. It was shown to somebody at AP?

A. Yes.

Q. Was it somebody on the desk?

A. Whoever was on the desk then.

Q. Was it as they had relayed it?

A. Yes, it was.

Q. And it went on the wire?

A. That is right.

Mr. FITZPATRICK. I have no other questions.

CHIEF HEARING EXAMINER. Mr. McKenna?

By Mr. McKenna:

Q. I have only one question. If your story had been wrong, you certainly would not have objected to somebody calling [3003] it to your attention, would you?

A. Not at all.

CHIEF HEARING EXAMINER. Mr. Whipple?

Mr. WHIPPLE. I am entirely satisfied with the witness's testimony.

CHIEF HEARING EXAMINER. Unless there is something further the witness will be excused.

Thank you, sir.

(Witness excused.)

Mr. KESTENBAUM. Mr. Stout will be our next witness. Whereupon,

Jed Stout was called as a witness and, after being first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

By Mr. KESTENBAUM:

Q. Would you state your name and position for the record, please?

A. Jed Stout. I am a reporter for United Press International.

Q. Have you been assigned to cover this proceeding?

A. I have.

Q. When were you assigned to this?

A. In February of this year.

Q. Since that time have you been contacted by any [3004] official or employee of the applicants concerning the nature or

content of any of your stories or the coverage of this proceeding by your wire service?

A. I have been.

Q. Would you please describe to us those episodes?

A. The first instance was a call to my home shortly after the Federal Communications Commission stated its approval of the merger with reference to a story that appeared in the Wall Street Journal that reported that the antitrust division of the Justice Department was going to take this case to court. I was asked about what I knew of that report, as to its truth and questioned for about 20 minutes during the phone conversation about it.

Q. Do you know who it was who called you?

A. A man I know as Jack Horner.

Q. Was he inquiring as to your knowledge or what did he say about it?

A. He was inquiring as to my knowledge of the story and he asked me to make inquiries in the Department, which is my primary base of operations——

Q. The Department of Justice?

A. The Department of Justice—as to whether or not this decision had actually been made.

Q. According to an exhibit which has been put in the record the story in the Wall Street Journal was on February 6. [3005] Could you place in your mind when that conversation occurred?

A. That was a Monday, I believe, February 6. It was that evening that the call came.

Q. Could you go on to the next contact?

A. This initial contact had come after some discussion in my office the preceding Thursday, which would be the 2nd of February on the nature of the stories I had written about the Commission's action in staying the merger.

Mr. WHIPPLE. May I be clear? We are going back from the 6th to the 2nd of February?

The WITNESS. That is correct.

By Mr. KESTENBAUM:



Q. The discussion was between whom?

A. Between myself and my superiors at the office over my choice of words in describing the action the Commission had taken.

Q. Did your superiors tell you what prompted this discussion?

A. It was my understanding that complaints had been received from——

Mr. WHIPPLE. I object on the grounds of hearsay, Mr. Examiner. If they want to prove what prompted it they can put the people who spoke to Mr. Stout on the stand. They have subpoena powers. Let them prove their case through the mouths of the witnesses who spoke to Mr. Stout. I think that [3006] is only fair in view of the level of the charges.

Mr. KESTENBAUM. I am not asking for the contents of the communications. I am asking what it was so far as he knows his superior relied upon or what it was that caused his superior to take the action of discussing it with him.

CHIEF HEARING EXAMINER. I think that is reasonable.

Mr. WHIPPLE. I object. That is double hearsay. To ask a man what somebody else relied upon in saying something to the man himself.

CHIEF HEARING EXAMINER. In the record course of business. The witnesses superior received certain information which he relaid.

Mr. WHIPPLE. The question was what they relied on, it was not what they relaid to him.

CHIEF HEARING EXAMINER. Very well. If you will rephrase the question.

By Mr. KESTENBAUM:

Q. Did your superior tell you what prompted his discussion of the language of your story with you?

A. Yes, he did.

Q. What did he say?

A. He said there had been complaints received from officials of the American Broadcasting Company as to the accuracy of my description of the action.

Q. What part of your story was your superior discussing [3007] with you in the course of that conversation?

A. In the first instance the discussion involved my use of the words "withdrawal" or "approval" in discussing the FCC's action in this case. It was my superior's belief that this was an improper choice of words.

Q. I take it the action which you are describing is the Commission action on February 1 which directed the parties to file evidentiary material and specification of issues? Is that the order you are referring to?

A. It was the order staying the merger, which also had in it a time schedule for the various parties to submit evidentiary material.

Q. Could you go on to the next episode you recollect?

A. On or about the 7th or 8th of February, it was on the 7th, with reference to this Wall Street Journal story, Mr. Horner called me at my Justice Department office in reference to our conversation the preceding night and asked again if the Department had any comment to make on this Wall Street Journal report. I said I knew of none. He told me that a telegram had been sent by ITT to the Justice Department asking for information, as to whether or not the decision had been made, and later on in the day in another telephone conversation he called me back to say they had received an answer which, in effect, said that the decision had not been made and asked if I had a copy of that telegram. I said [3008] no, I did not. He provided me with one which was the basis for a five or six paragraph story saying that the Department had made no such decision.

Q. Could you go on, sir?

A. Subsequent to that, on, I believe it was, the 8th or 9th of February, I had lunch with Mr. Horner and we discussed the nature of news reporting that surrounded this merger. He said to me that he thought that there had been a great amount of inaccurate reporting and in particular this Wall Street Journal characterized the reporter as a "Hip Shooter." He said he felt that questioning of ITT president Harold Geneen's testimony as far as assurances in the news autonomy area were unwarranted. To the best of my recollection that was about the sub-

stance of the conversation, except that he commended me for my own news ability.

Q. Were there any other contacts or communications that you want to report?

A. He has called my home at least on three other occasions, two of them I was not there. The third I attempted to return his call, but could not reach him. On one of the occasions it was with reference to a story that emerged from this hearing—

Q. Do you recollect when that was?

A. I believe it was last Tuesday or Wednesday night. It was with reference to the story as to ITT's estimates of [3009] \$100 million cash flow off as an important factor in ITT's decision to merge with ABC. I did not talk to him about it. I found out from another reporter what the call was about.

Q. Did you talk to him afterwards?

A. I saw him the next morning. He told me that another story that had appeared was inaccurate and he had only called to check to see that I had not fallen into the same trap as one of my colleagues.

Q. Are there any other contacts or communications that are relevant to my first question?

A. I do not believe so.

MR. KESTENBAUM. Thank you.

CHIEF HEARING EXAMINER. Mr. Fitzpatrick?

#### CROSS-EXAMINATION

By Mr. FITZPATRICK:

Q. How long have you been with UPI?

A. Since May of 1964.

Q. How long have you been in the newspaper reporting business?

A. Since January, 1962.

Q. Where were you before you were with UPI?

A. I was a city hall reporter for the Hartford, Connecticut, Times.

Q. Now, when Mr. Horner called you with reference to the Wall Street Journal article, the first phone call you [3010] relayed here, February 6 or 7th?

A. Yes.

Q. Was that an article written by yourself?

A. No, it was not.

Q. Now, he asked you to see what you could find out from the Justice Department about what their plans were in court, is that it?

A. That was my understanding of his request and specifically as to the accuracy of this Wall Street Journal story.

Q. Do you get many requests by individuals who are interested in certain case litigation asking you to check up on your sources so that you can furnish them information?

A. This was the first that ever came my way.

Q. Did you agree to do it?

A. No.

Q. Did you refuse to do it?

A. No.

Q. Did you do it?

A. No.

Q. Now, sir, who was the superior, your superior at UPI with whom you had the conversation concerning the accuracy of your reporting?

A. There were two people involved.

Q. What are their names?

[3011] A. Mr. Grant Dillman and Julius Frandsen.

Q. Are they both superiors of yours?

A. Yes, they are.

Q. Do they review your copy?

A. Yes.

Q. Did either of them identify the ABC man who had contacted them?

A. To my recollection, no.

Q. How often during your reportorial career have you had individuals who had an interest in a story call your superiors and question the accuracy of your reporting?

A. I can't tell you exactly, but a number of times.

Q. In this instance were your superiors in agreement with the ABC officials as to their complaint?

A. Yes.

Q. In most instances were your superiors in agreement with the complaints made?

A. No.

Q. Is it customary for you to receive phone calls at the Justice Department from people seeking to use you as a source of information?

A. No.

Q. You had lunch with Mr. Horner on the 8th or 9th of February?

A. Yes.

[3012] Q. Who initiated that luncheon?

A. It was a mutual proposition. After my experience the preceding week on the first story, I had never talked with anyone from ITT and in the interest of learning who these people were I said it would be a good idea if at some point we had a talk. As I recall he suggested a lunch and a date was set.

Q. Are you familiar with Mr. Horner's qualifications as to whether he has any journalistic background?

A. He said he used to be a newspaper man, himself.

Q. Did he identify where he worked or what newspaper or what the extent of his newspaper was?

A. I believe it was the Washington Star, but I don't know how long he worked there or in what capacity.

Q. Now, during the luncheon you say that you and he discussed in general the newspaper reporting or coverage of this hearing: is that correct?

A. Not of this hearing, but of the merger case.

Q. Of the merger case.

A. The merger case.

Q. Was he generally critical of the reporting which has taken place?

A. Yes.

Q. Now he apparently made specific references to the reporting by the correspondent for the Wall Street Journal, is [3013] that your testimony?

A. In that particular story, yes.

Q. Did he make reference to a particular story that appeared in the Wall Street Journal?

A. Yes, it was a story that reported that the Justice Department planned to take this merger case to court.

Q. Now, you made some reference to the fact that some comment was made by Mr. Horner at this luncheon as to the reporting of Mr. Geneen's testimony; is that correct?

A. No, it was not the reporting so much as the challenges to assurances given by Mr. Geneen in reference to news autonomy of ABC that he found in the order to reopen the case.

[3014] Q. Excuse me. I am afraid I don't understand this. Was this with reference to what coverage was made of this aspect of the case?

A. Not directly. It was part of the discussion having to do with the coverage of the case. Another portion of the discussion had to do with whether or not Mr. Geneen's assumption had been open to question.

Q. I see. That had nothing to do with the reporting of the case at all?

A. Well, I think the two are interrelated.

Q. Did Mr. Horner question whether the very issue as to the control of the news and the autonomy that might develop with ABC if ITT were to merge should not be a matter of inquiry by the FCC?

A. As best as I can recall what he said, he thought that the assurances given by Mr. Geneen as to the autonomy of ABC news in the event of the merger should be enough.

Q. Did he make any comment as to whether or not inquiry should be made by the FCC or the Justice Department testing these assurances by Mr. Geneen?

A. I don't recall any specific comment about whether or not inquiry should be made.

Q. Now, the two or three occasions when Mr. Horner called your home and you were not at home, did he leave a message identifying himself?

[3015] A. Yes, he did. My wife took the call.

Q. Prior to the ITT-ABC merger or your coverage of it, did you know Mr. Horner?

A. No. The first contact I had with him, he called my home and asked my wife if "Jud" were home and identified himself as an old friend.

Q. When you met him the next day and he said that another reporter had apparently, had not been accurate in reporting the event of the previous day's hearing.

A. Yes, that was what it was all about.

Q. Where was this conversation held?

A. In the corridor outside the hearing room in the ICC building.

Q. Did he elaborate on what the inaccuracies were and what article it was?

A. I don't know that he elaborated on it. We both knew the story he was talking about.

Q. How did you know?

A. When the call came to my home the preceding night and my wife told me that Jack Horner had called, I checked with Steve Aug of the AP to see if he had been called too, thinking that if there was something up, he might be calling Steve, too.

As it turned out, he had. It was with reference to a story that Steve had written on this throw-off question.

[3016] Mr. FITZPATRICK. I have no other questions.

CHIEF HEARING EXAMINER. Mr. McKenna.

By Mr. McKENNA:

Q. Mr. Stout, I would like to put in perspective a bit the reason for the call that your New York superiors received from the unidentified ABC official.

As you pointed out it had to do with the wording of your story which bore on the February 1 release of the FCC.

A. That is right.

Q. As I recall, you said that you had written that the FCC had withdrawn its approval of the merger?

A. That is correct.

Q. In fact, the FCC had merely stayed the effectiveness of its order approving the merger, is that correct?

A. That is the effect of the ruling, yes.

Q. Now, sir, are you aware, as I am sure you are, that officials of any company have a responsibility to stockholders?

A. Certainly.

Q. Are you aware, sir, that when the Department of Justice filed its petition for reconsideration that in one day the market value of the ABC stock dropped \$70 million?

A. I don't follow the stock market.

Q. That could explain the concern about accuracy, could it not?

Mr. FITZPATRICK. Objection. He has no way of knowing what [3017] the basis of the concern was.

CHIEF HEARING EXAMINER. Apparently he doesn't know, Mr. McKenna.

By Mr. J. McKENNA:

Q. Do you know, Mr. Stout, if in fact your story was corrected?

A. Yes, it was.

Q. You did agree with the correction?

A. I did not. It was corrected by persons other than myself.

Q. In New York?

A. No, in Washington.

Q. Thank you.

CHIEF HEARING EXAMINER. Mr. Whipple.

By Mr. WHIPPLE:

Q. Mr. Stout, did I understand you to say that your office is located in the Department of Justice?

A. My base of operations is in the Department of Justice, in the press room.

Q. Do you have an office there, a desk there or telephone?

A. Yes, I have my desk and files there.

Q. That is your base of operations?

A. Yes.

Q. What is your beat so to speak? What areas of the [3018] Federal Government?

A. Justice Department, Federal Trade, Federal Communications, U.S. District Court, Civil Rights Commission and occasionally, Labor, HEW.

Q. That is a pretty comprehensive canvas.

A. It is geographic.

Q. It sounds almost cosmopolitan to me. In the course of your duty, I take it, you do have access to representatives of the Anti-trust Division of the Department of Justice, is that correct?



A. In a very limited fashion, yes.

Q. Why do you say very limited fashion?

A. The operation of the Department of Justice is such that in many cases, the quickest way to get information is through their information people—people in the Division are sometimes working on cases where they are reluctant or unwilling to talk to reporters—and can discuss that kind of matter with their information people so that I get what they consider to be the legitimate information.

Q. Have you found the representatives of the Department of Justice in this case unwilling or reluctant to talk to reporters?

A. I have not talked to anybody from the Department of Justice in this case except those who are here with reference to this case.

[3019] Q. I will confine my question to those who are here. Have you found them reluctant to discuss this case with you?

Mr. KESTENBAUM. I am going to have to object to that line of questioning again.

Mr. WHIPPLE. I don't see why the Department should be afraid to have these facts put on the record.

Mr. KESTENBAUM. I think we should proceed with the other evidence to be presented today.

Mr. WHIPPLE. What is the Department afraid of?

CHIEF HEARING EXAMINER. I will have to sustain the objection. I think it is completely irrelevant here. It is not part of cross-examination.

Mr. WHIPPLE. Mr. Examiner, I will make this man my own witness in the interest of expediting things.

CHIEF HEARING EXAMINER. The same ruling as with reference to Mrs. Shanahan.

By Mr. WHIPPLE:

Q. Have you been covering this proceeding pretty steadily throughout?

A. Yes, I have.

Q. Did you cover Mr. Goldenson's testimony?

A. I was here for the major portion of his testimony.

Q. Did you cover Professor Hill's testimony?

A. Yes, I did.

Q. Did Mr. Kestenbaum or any of his representatives hand [3020] you a copy of Professor Hill's statement before Professor Hill took the stand?

Mr. KESTENBAUM. The same objection as before, Mr. Examiner.

Mr. WHIPPLE. Mr. Examiner, it is fundamental to this country—I speak strongly of this—we have something called freedom of speech and freedom of inquiry. If anybody believes rightly or wrongly that the press, through no fault of its own, is not getting both sides of the story, they have the right to reporters and to put their side of the story before the reporters.

Now, the reporters can take the matter or leave it. I suggest one of the fundamentals of this country is something called freedom of speech and freedom of discussion.

I think all reporters here, Mr. Stout, Mr. Aug, Mrs. Shanahan, would agree to that. I would like to know if before Professor Hill took the stand, the Department of Justice did in fact hand his statement to the reporters in the hearing room.

Mr. KESTENBAUM. Mr. Examiner, the matter is discussed at Page 1699 of the record in which Mr. Cohn, Mr. Whipple's associate, referred to this event which occurred and went on to say, I think once or twice, to make a suggestion about handing out statements and I think he said twice that he was not in any way suggesting any impropriety.

[3021] I believe if Mr. Whipple had any objections, he might have raised them at the time instead of letting his colleagues say there was no impropriety but that a certain procedure might be followed from then on.

The matter was discussed at the time. I see no reason for having it brought up now.

Mr. WHIPPLE. We don't charge impropriety. If Mr. Kestenbaum is sensitive about that, that is his problem. I just want to get the fact on the record.

CHIEF HEARING EXAMINER. I don't think it is of any consequence one way or another personally.

Mr. WHIPPLE. You don't think it is of consequence that the Department of Justice hands out statements of witnesses before they take the stand. This was late in the day.

CHIEF HEARING EXAMINER. Not under the circumstances. Let us proceed.

Mr. WHIPPLE. I do not need to detain Mr. Stout any further.

CHIEF HEARING EXAMINER. Very well, sir. Unless there is something further, you are excused.

(Witness excused.)

Mr. J. McKENNA. Mr. Examiner, the question was raised as to the identity of Wilbur Schramm, the author I read from. I would like to know for the record that the flyleaf of the book states that "This book is one of a series on ethics and [3022] Council of Churches subsequently merged in the National Council of Churches."

I might also add that I was led on to Wilbur Schramm as the author by a question of Commissioner Johnson during the September hearing in which he made reference to him.

CHIEF HEARING EXAMINER. Very well, sir.

Mr. KESTENBAUM. Can you give me the date of the book, Mr. McKenna?

Mr. J. McKENNA. Copyright 1957.

Mr. COHEN. There are a number of editions of this book for Mr. Kestenbaum's information.

\* \* \* \* \*

[3023]

#### DIRECT EXAMINATION

#### TESTIMONY OF HYMAN H. GOLDIN

By Mr. KESTENBAUM:

Q. State your name for the record?

A. Hyman H. Goldin, associate professor of communications at Boston University.

Mr. KESTENBAUM. In order to expedite the proceeding, Mr. Examiner, instead of inquiring of the witness concerning his background and qualifications, which are I think pretty well known to the Commission, let me show him a document which I have labeled J-346 which contains the listing of the background and publications of the witness and ask him whether that is a true and correct statement?

The WITNESS. It is.

CHIEF HEARING EXAMINER. It will be admitted into the record at this time.

(The document referred to was marked for identification as Exhibit No. J-346 and received in evidence.)

[3024] By Mr. KESTENBAUM:

Q. Dr. Goldin, in the record thus far there have been made various statements characterizing the television broadcasting industry in general economic terms. On the one hand it has been stated that television broadcasting revenues show consistent non-cyclical growth characteristics and that the industry is resistant to downturns in the business cycles?

Q. And on the other hand it has been stated that with reference to ABC that its business is entertainment, a highly [3025] volatile and cyclical business. I am citing page 4 of the letter of Mr. Goldenson of July 25, 1966, and that it is a speculative industry. I am citing transcript 1664.

Which of these in your opinion, if one of these statements is correct, which is it, sir?

[3029]

Q. Dr. Goldin, if you remember the question I wonder if you can respond to it.

A. The outstanding characteristic of the television industry is that it is a growth industry in the period under study approximately from 1955 to the present time. During this period the increase in revenues each year, whether you [3030] think in terms of the industry as a whole or the three networks or the networks in their owned and operated stations, the percentage increase each year over the preceding year has exceeded GNP.

In other words, this is one of the measures of a growth industry.

Now, this does not mean that the television industry is not susceptible to changes in GNP. It is. There is cyclical behavior. But the predominant characteristic is the growth which overcomes by and large the cyclical factors.

If you study any one of the years compared to the previous year, you will see that this growth characteristic or the secular behavior is far more important than the cyclical behavior.

This is true both in terms of experience and in terms of concept, because while the product of the television industry may be entertainment predominantly, although I hope it is not exclusively entertainment, the buyer of this service is the advertiser and the advertisers who advertise on television are predominantly on the consumer side and not only on the consumer side but on the non-durable side of consumer goods and this aspect of the economy is less susceptible to strong cyclical behavior. By that I mean some of the predominant advertisers on television are foods, cereals as one of the foods, soaps, cosmetics, cigarettes, these are [3031] industries which do not have violent cyclical behavior. So that both in theory and in fact I would say that during the period that we have under study while there are changes in the revenues and they don't always go up—they do go up every year but the increase each year is not uniform, there are changes.

In other words, during the last year the increase in the overall revenues of the television industry between 1964 and 1965, which are the last published figures, was an increase of 28 percent as compared with an eight percent increase in GNP. So that this is an example of the strong growth characteristics of the television industry.

Q. In your opinion, Dr. Goldin, and based upon your experience, what are the prospects for that growth in the future?

A. I think the growth prospects for the television industry are excellent. This is based on the fact that consumer expenditures are increasing; the economy is growing, population is growing, leisure time is increasing. There are all positive factors in terms of the growth of the television industry.

Q. Dr. Goldin, when Mr. Goldenson was testifying concerning feature film telecasting by ABC he made the following statement at pages 1605 and 1606 of the record, "We do not make any money on the program as such. We allocate always [3032] the cost of our program. The only profit we make is on the time." Do you have an opinion on that statement?

A. Historically in the television industry it is probably true that program costs as such were not met on first exhibition. This was made up for by the profit on the time sales and in economic terms I would consider these a joint product as they are the same economic units. The reason that the networks were subsidizing the cost of programming to a certain extent is because it increased the number of viewers and therefore increased the rates and therefore increased the revenues that they were going to obtain.

So that in terms of the total take, the fact that they may not have realized all of their costs on programming in the first instance is not terribly significant. The significant thing is that the judgment to subsidize programming costs in result in increases revenues for the time sales which overall meant a larger take to the networks.

Now, in more recent years this bifurcation between programming costs and time sales has kind of disappeared because with participations these costs now become joined and therefore the relevancy of separate programming costs and separate time costs are not as significant even as they were before.

Q. Is your answer affected at all by the method by which the programming is produced and supplied or the identity of the producer or supplier of the programming?

[3033] A. In the earliest days of broadcasting and particularly in radio, much of the programming came in from the advertising agency. In fact, the networks had nothing to do with the programming costs. They were brought in and they were concerned only with the time sales. As they became program suppliers of their own they then were faced with the need to sometimes subsidize the programming costs in order to build up the time costs. But in terms of modern day economics in the broadcasting industry, I see very little significance in this bifurcation.

Q. Do you know, sir, to what extent sales are made today on a participation basis, the term you used, as distinguished from the division between as you say bifurcation between program and time sales?

A. I understand an ABC witness testified that two-thirds of the time of ABC was sold on a participation basis.

Q. Do you have an opinion, Dr. Goldin, on the persuasiveness or validity of using network profits, the profits or loss of the network operation itself as a test of a broadcasting company's performance and its competitive position as distinguished from the overall profit and loss of the TV broadcasting operations of the firm?

Mr. COHN. Mr. Examiner, I must confess that I am completely dazzled, amazed, and confused. Can I have the reporter read this back?

[3034] CHIEF HEARING EXAMINER. Read it, please.

(The reporter read the record.)

CHIEF HEARING EXAMINER. Proceed, Doctor.

The WITNESS. I think the most significant fact in evaluating the television profits or revenues of the networks is to consider the network plus the owned and operated stations. The reasons I have for this statement are various.

First, I would like to read from the network broadcasting study which on page 456—

Mr. COHN. Mr. Examiner, instead of the Doctor reading from it, can we refer to it?

The WITNESS. It is only a few lines, sir.

CHIEF HEARING EXAMINER. Apparently it is brief. Let us proceed.

Mr. FITZPATRICK. What page?

The WITNESS. Pages 456 and 457.

It is a discussion of relative network and station profitability. I will start in the middle and the counsel can refer to the earlier parts to be certain that it is not read out of context.

Similarly, the networking operations cannot be considered in isolation since it tends to be part of a package in which it enhances or is enhanced by the value of other company interests. For example, there is good reason to consider networks and their owned and operated stations in combination [3035] as a single economic unit since the interrelationship between the two is so marked with respect to costs and to revenues.



Mr. FITZPATRICK. Did you leave a word out?

The WITNESS. "Both to costs and to revenues."

There are many statements that have been made before the Federal Communications Commission. Some of them are in this report in which one or another of the networks including CBS and NBC and ABC have stated categorically that in order to provide an adequate networking service they have to have owned and operated stations and that the owned and operated stations are indispensable in the early days of the networking to provide a source of stable revenues and stable income so that the networks would have sources of funds to experiment with in terms of building the network.

The important point about this interrelationship is that it enables the networks to own very, very profitable stations in the three largest markets of the country, New York, Chicago, and Los Angeles. And the difference between having an affiliation in these markets and not having an affiliation in these markets may be indicated by the fact that if you look at the 22nd time rate in any of these markets you will find there is a very sharp difference in the time rate of one of the owned and operated stations and in independent.

Now, owned and operated in this context merely means [3036] affiliated. There is no special virtue in having the owned and operated. This is not what accounts for the enhanced value of the station. The important thing is that you couldn't have a network operation, that you couldn't have an affiliation in New York, for example, unless you belonged to a network under the system as it operates in television and in radio exclusive of Mutual. In other words, if the network and the stations were separated, then the value of the stations in New York, Chicago, and Los Angeles, would be very significantly different.

In Chicago, for example, the 22nd rate, the highest one time 22nd rate for the owned and operating stations are 1800, 1950, 1950. WGN, which is the fourth V in the market, fourth commercial V in the market, is 600. In other words, one-third of the 22nd rate of the three owned and operated stations.

In Los Angeles you have a similar situation where the 22nd rates of the owned and operated stations are in the 2,000, 2100,



2150, and the highest 22nd rate which appears in Standard Rate and Data is KCOP with 1765. In other words, again, a ratio of one-third, the rate for the unaffiliated station is one-third.

In New York the rates for the three owned and operated stations are 2950, 3200 and 3200. There is one station which has 2,000. That is WNEW, but after that it falls down to 600. [3037] So that this is a reflection of the enhancement of the value of a network and that, therefore, in my opinion, there is a very strong interrelationship between the network operations and the owned and operated and, therefore, they should be considered as an economic unit.

Now, for statistical purposes it may be interesting and significant from time to time to compare the network alone and these figures have been published by the FCC separately since 1960. But in economic terms what I would consider the more significant is the overall profitability of the networks including their owned and operated stations.

By Mr. KESTENBAUM:

Q. I would like to turn to the question of coverage. In how many cities, sir, if you know, do the three major networks have affiliates or owned and operated stations of comparable technical capability, that is all U or all V?

A. As I understand in the top 100 markets, and I think perhaps it is most significant to consider in in that context, there are approximately 80 or 82 markets in which there are either three V's or three U's.

Q. In the remaining markets, that is the markets in which you don't have three available outlets for affiliation how do the three networks compete in your opinion?

A. The competition is to get clearances on the two stations and from the point of view of the Commission's policy [3038] maximizing the freedom of the station and giving them the opportunity to choose their programming, the stations are in a more favorable position because now they have the opportunity of choosing the programming offerings of more than their single network. The typical pattern in these cases is for one of the stations in a two V market to be the primary affiliate of one of the networks and the other station typically, although

not uniformly, will have affiliation arrangements with two networks, though a single station affiliation arrangement is more likely to be CBS and the other NBC or ABC but this again is not uniform.

What this means is that because of the change in the chain broadcasting rules the station cannot be, the network cannot require exclusivity on the part of the stations in terms of clearances so that three networks can compete for the time of two stations or one station as the case may be. This competition occurs in several different ways. It occurs in the context of the popularity of the programs being offered. It takes place in the context of the total offerings by that network. It takes place in the context of the compensation arrangements between the networks and the station and these are the primary elements of the competition.

But the important thing is that because there are two stations in the market does not mean that three networks do not get some time on those two stations.

[3039] Q. Do you have an opinion, sir, as to how ABC has done in competing in those markets in the ways you have described?

Mr. COHN. I object. I don't understand what, "How it has done" means.

By Mr. KESTENBAUM:

Q. How well it has done. You described the competition in terms of affiliation and clearances. To what extent has it been successful in obtaining affiliations and clearances in those markets?

A. It has been more successful in terms of clearances than it has been in terms of primary affiliation. Secondary affiliations it can have with the stations irrespectively. The more important criterion here is primary affiliation.

In some of the largest markets ABC has primary—in some of the largest two V markets, for example, ABC does have the primary affiliation such as Birmingham and Dayton. Now, these are both at higher rates than are offered by the other networks and these do depress the earnings potential of ABC.

Q. When you say both at a higher rate, what do you mean?

A. That is the compensation arrangement between the network and the station is likely to be at a higher rate than the standard. If the standard arrangement between the affiliate and CBS is in the order of 28 percent, the ABC arrangement may be as high as 40 or 45 or 50 percent in some cases.

[3040] Q. What they are paying to break in, is that the idea?

A. That is right, to get their programs primarily cleared on that station. But this is by no means uniform because in other instances, and there are a number of these, the stations are eager to take the popular programs of ABC in addition to the popular programs of another network and here the arrangement does not partake of special payments.

There is a uniform program arrangement and the network is not required to pay significantly higher for these clearances.

Q. There is a statement in the record, I believe it is in J-5, which was that the statement made in 1965 by the President of ABC that at that time ABC was virtually tied in prime time audience.

Taking it as a fact established in the record that their coverage in terms of primary affiliation is less, how do they go about becoming virtually tied in audience for prime time programming?

A. There are two methods as I suggested. One, that the popularity of the programming attracts clearances. ABC speaks of its 137 affiliates, prime affiliates, but this is not the measure of their clearances in prime time.

So that the so-called difference in coverage of the 93 and the 98 or 99 of the other two networks is not a fixed unit. It has to be measured in terms of program hours and [3041] during the prime time ABC does get substantially the same clearance as the other two networks.

By that I don't mean it is as good as but the difference is not significant. Some part of that clearance is on a delayed basis but primarily the delays are within prime time. So that taken over all, the difference between 93 and 98 is not reflected in the clearance pictures in the evening for the bulk of the ABC programming.

There is a difference. I don't want to again say that there is no difference. But it is not measured categorically in this simple sense of 137 affiliates against 200 affiliates or 93 against 99. It has to be considered in each hour of the evening segment.

Now in addition to the popularity of the ABC programming which does attract clearances, as I mentioned before they have paid a higher payout to certain stations, particularly in the largest two V markets and this has been a factor there.

Mr. COHN. Mr. Kestenbaum, may I interrupt for the purpose of asking the Doctor to clarify this so that we have it all in one place?

What do you mean by payout, what you mean by larger payout.

The WITNESS. To give an example, if the time rate of a station is \$1,000, that is, for our purpose the charge to the advertiser. From this the network will deduct approximately [3042] 28 percent or \$280 which will be payable to the affiliate for the opportunity to carry the network program on the station's time. This is different from most other industries in which the buyer pays the seller, in this case the seller pays the buyer, if you will, the network pays the station to carry the program time and supplies the program and supplies the advertiser.

It is a very interesting and historic arrangement but to answer Mr. Cohn's question, the payout here means what the network pays the station for carrying the network's program during a given unit of time.

Mr. COHN. That is what you mean by payout, what the network pays the station?

The WITNESS. It is what the network pays the station affiliate.

By Mr. KESTENBAUM:

Q. This is a percentage of the charges by the network to the advertiser?

A. It is a percentage of the station's time rate which is what the network sells the station to the advertiser. That is in the context of talking separately of time rate and program times. This gets mixed up when you are talking about participations.

But in the historical sense this is what we are talking about.  
 [3043] Q. You mean by that that even though the trend has gone very strongly to participation, the time rate is still used to calculate the payout?

A. Exactly, although the charge to the advertiser will include part of the programming cost.

Q. You mentioned delayed broadcasting and you stated that the delay is frequently—I don't want to correct the record but frequently or most often in prime time. What are the disadvantages of delay to the network?

A. These vary. The one important aspect of simultaneity is the promotional activities which the network and station can engage in and also the program schedule of the network is made up in a certain way to promote a flow of audience from one program to another.

By having delays you may interrupt the planning behind the program schedule of the networks and you don't have the full advantages of the promotional activity. Sometimes, however, depending on the competition with the other stations in a particular market, the delayed broadcast may garner a larger audience than in the normal time period. This varies in the different markets.

Q. But if a delay would take the broadcast outside the prime period would that have an effect?

A. It would ordinarily have an effect both in terms of the payment to the station and also in terms of the average [3044] audience expected.

Q. You talked before about the performance of ABC in the prime time programming segment of the day. Let me show you Document J-273 which is an excerpt from Broadcasting Magazine reflecting the network revenues for January.

Looking at that could you compare the ABC's performance in prime time programming with its performance during other parts of the broadcast day?

Q. You were talking before about the relationship of coverage and programming. I would like your opinion, Dr. Goldin, on the relationship of programming, of improvement in pro-

gramming and improvement in coverage as affecting ABC's position.

[3045] I suggested to the witness that by looking at the program today he might be able to elucidate that for us.

Mr. COHN. Mr. Examiner, I object.

All this is is a seminar discussion on a general kind of subject but really no comprehensible or intelligent question has been posed to Dr. Goldin.

CHIEF HEARING EXAMINER. I will have to overrule the objection, Mr. Cohn. I don't agree with you.

Proceed, sir.

The WITNESS. What these data show to me is that in the 7:30 to 11:00 segment, Monday through Sunday—

By Mr. KESTENBAUM:

Q. Is that night, sir?

A. 7:30 to 11:00 p.m., Monday through Sunday, ABC is highly competitive with the other two networks in terms of the revenues or billings in this case that they derive from the advertisers or as computed by broadcast advertiser reports.

Mr. COHN. Mr. Examiner, I object.

The Doctor's testimony is based upon hearsay evidence of Broadcasting Magazine. He is drawing certain conclusions from certain words which are set forth on a piece of paper that the Broadcasting Magazine published. I am not attacking the validity of such a broadcasting publisher, but it is improper to draw these kinds of conclusions from something that has no authentication whatsoever.

[3046] CHIEF HEARING EXAMINER. Over your objection and exception, Mr. Cohn, I am going to let the witness proceed. The Commission will be informed of your position with regard to the basis of his opinions and expressions.

Proceed.

The WITNESS. I think in addition to the fact that during these hours they do derive roughly equal revenues which indicates that they are getting coverage and that they are selling to the advertiser at rates which are comparable, the important thing to me is what it shows about the rest of the day.

What this indicates is that ABC has proved to be competitive during the evening segment but during most other parts of the broadcast day they are significantly behind. This has an effect of course on the clearance situation, that is in terms of getting primary affiliations at least.

In the evening where ABC is offering programs which are popular, almost as popular as the other two networks, they are able to get time clearances. But ABC does not start broadcasting until 10:30 or 11:00 in the morning.

Up to recently they have not had a show to compete with the Johnny Carson Show although they have started now with the Joey Bishop Show, and during the daytime they have been very far behind the CBS leadership.

[3047] By Mr. KESTENBAUM:

Q. What are the daytime hours, sir?

A. The daytime hours are 10 a.m. to 6:00 p.m.

Mr. COHN. That is eight hours.

The WITNESS. That is right.

So that in order for ABC's position to improve it would seem to me that their growth possibility is most important in terms of the development of programming of the same degree of popularity as their evening hours in the other segments of the broadcast day.

Now I am not assuming that this is an easy thing to do or that it can be done over night but clearly this is the important aspect of the competitive situation and it is this which has to be worked on by ABC and which I assume they are, witnessed by the Joey Bishop Show.

It is this aspect which is very important in the growth of the ABC network and its competitive situation.

By Mr. KESTENBAUM:

Q. Dr. Goldin, when you were describing the competitive relationship in a one- or two-V market you did not mention, if my memory is right, you did not mention the alternative of establishing an affiliation arrangement with a UHF station.

Can you tell us why you did not?

A. In a number of cases ABC does have an affiliation arrangement with UHF stations. The important point, however,



is [3048] that UHF set saturation is still at the level approximately of one-third and the coverage of the UHF station is still significantly below that of VHF in many of these markets.

So that the advertiser does not regard a UHF in many cases, although not uniformly but in many cases, a proper substitute for a clearance on a VHF even if the clearance on the VHF is not precisely at the time that this program is broadcast.

In other words, the UHF is still competitively at a disadvantage in many of these places.

[3051]

Q. The problem of UHF, Dr. Goldin, has been discussed here and in particular let me refer to the testimony of Mr. Geenen some days ago in which he described, beginning at pages, for the benefit of counsel, 1941 of the record, technical developments which he said if successful would make the UHF signal absolutely competitive and also would make it as convenient and as attractive to the viewer to go to UHF.

Could you state for us in your opinion, Dr. Goldin, the advantages, if any, and the disadvantages, if any, which would result to an existing network if these developments were to succeed in the near future and if there were to be a larger number of UHF station outlets throughout the country.

Mr. COHN. I would like to hear that question read back.

CHIEF HEARING EXAMINER. Read it please.

(The pending question was read by the Reporter.)

Mr. COHN. Mr. Examiner, if I ever heard an improper question in my life, that is it.

CHIEF HEARING EXAMINER. I overrule the objection. I [3052] think the witness is equipped to answer it.

Mr. COHN. There is no question about Dr. Goldin's being equipped to answer a properly worded question. I want to make that clear.

[3053] CHIEF HEARING EXAMINER. I overrule the objection.

The WITNESS. The main advantage of ABC, it would benefit particularly in terms of having additional numbers of UHF outlets that would be competitive and, therefore, that they would expect to take their program schedule.



This is certainly an advantage to ABC. It is less of an advantage to NBC or CBS which by and large have better clearances, especially in the daytime. But there are disadvantages as well as for ABC.

One disadvantage would be that if UHF becomes fully competitive, I would assume that in most of the hundred top markets, a large number of them certainly, there would not only be one additional UHF station, but two or more and, therefore, this begins to open up the possibility of an additional network.

Therefore, ABC would now be competing with three other networks rather than with two other networks and certainly, the audience time would be fractionated and the share of audience rating in one network particularly, would tend to decline somewhat.

So that there are both advantages and disadvantages if you will from the purely private position of the network in terms of the public interest. I think it is clear the desirability and need for an expansion of community outlets is there.

[3058]

By Mr. J. McKenna:

Q. You started off your testimony by saying that you considered that the network and the owned and operated stations should be considered as a single unit for purpose of computing the profits or losses.

A. I said there is considerable validity in considering [3059] them.

Q. You are aware, of course, that the ABC Network has operated at a loss for a number of years?

A. I am aware that the ABC Network has operated at a loss. I am also aware that between 1960 and 1966, they have increased their revenues by \$104 million and that in each of the years that we have on record, 1960 to 1966, where there is a separation of the figures between networks and owned and operated, that uniformly, they have operated profitably on the owned and operated side and together, the unit has been profitable.

[3076]

By Mr. COHN:

Q. Doctor, if I understand your opinion correctly, you stated, did you not, that when there was an O&O station, there was a value to the network over and above that as simply having an affiliated television station and, therefore, you lumped together, so to speak, the station and the network and you said that in order to take a realistic view of a particular network, you have to lump together O&O and the network.

A. Right.

Q. Now, Doctor, you then went on, did you not, in the [3077] case of Chicago and compared WGN's rates, which is an independent station with the network O&L stations in Chicago?

A. Right.

Q. Doctor, are there any cities in the United States where there are O&O stations and at the same time network affiliated stations which are not O&O?

A. I think you misunderstood the point. I wasn't saying that the O&O station has the higher rate because it is an O&O station. My point was that the only way you could have an affiliation in New York, Los Angeles and Chicago, under the present system, is to be part of a network operation and, therefore, I would quite agree with you if we went to Philadelphia or San Francisco or Detroit, you might find that the network owned station might have a lower rate in some cases and that is perfectly appropriate.

My point is a different point. The only way, unless you have a change in the network structure so that none of the networks can own stations, then you would have a whole different system including payments and everything else would change.

But under the present system, the only way you can get an affiliation with a network at least, with the three networks, and I am excluding mutual for present purposes, is to be a network and that is the way the stations in New York, Chicago, and Los Angeles get their affiliation.

Q. You would agree, Doctor, that a network affiliated [3078] station which is not an O&O station, competing in a market with network affiliated stations which are O&O stations

might have an equal or even higher rate than the network O&O station?

A. Oh, yes.

[3084]

Q. Doctor, you tell me why a corporation such as the [3085] American Broadcasting Company is willing to pay higher compensation to affiliates in Dayton and Birmingham than it would be to those other comparable cities except for the fact that these other comparable cities had three rather than two VHF stations?

A. This is not a practice limited to ABC. CBS did it, too, in the early 1950's when they were beginning their intensive competition with NBC. The basis for it is that if you have a primary affiliate, you have a somewhat easier job of greater acceptance, a higher statistical probability that you will get clearances from your primary affiliate and that this may be significant when you are competing for the National advertisement.

Q. And, therefore, Doctor, does it not follow that in every situation where there are two VHF's as distinguished from three, and those two networks are paying higher rates to the affiliate, that the third network, whether CBS, NBC or ABC, which tries to get into that particular market, in order to arrange for a clearance has a more difficult time because it has to compete with the higher rate being paid to the affiliate?

A. That is not true because, actually, in Birmingham, NBC has a regular affiliation, I believe, with the station and, I believe pays the regular compensation.

[3086] Q. I thought you gave Birmingham as one of the illustrations?

A. Even though ABC is paying higher rates this does not necessarily mean that the other network is paying the same rate.

Q. You did indicate that CBS at one point had to pay higher rates to the affiliates in order to get into markets?

A. Right. After a period of time this practice has practically vanished from CBS. It is a temporary phenomenon.

[§102]

## TESTIMONY OF JOHN CAMPBELL BURTON

By Mr. GROSSMAN:

Q. Professor Burton, on the basis of your study and analysis of ABC, did you arrive at an opinion as to whether ABC independently could raise the amounts of money needed to finance the AR-3 capital project?

A. My opinion is that they could.

Q. Could you summarize the basis for that opinion, Professor Burton?

A. I believe in the first place that the American Broadcasting Company is favorably situated in the economy. It is in the entertainment industry which is a popular industry in the financial marketplace due, both I think, to the assumption of increased leisure time which our citizenry is expected to enjoy in the future years and related to that due to the substantial growth which companies in this industry have shown over the past decade.

[3103] I think these factors plus the demonstrated ability of companies in this sector to raise substantial amounts of capital led me to the conclusion that it would be possible for ABC to finance these requirements themselves.

Q. Now, in coming to that conclusion, Professor Burton, did you give any consideration to the fact that ABC's existing loan agreements provide for certain limitations on the occurrence of further debt?

A. Yes, I am aware that both the Metropolitan Life agreement and the agreement with the four banks put restrictions on additional borrowing capacity.

I believe that it is reasonable to assume that these restrictions might be waived. I believe Metropolitan has already waived the restrictions on at least two occasions and I think that most institutional investors of this sort if they are convinced that additional financing is in the interest of the company, they will agree to waivers of debt restrictions of this nature.

So, I think it is reasonable to assume that such restrictions would be waived and certainly they would have to be to contemplate this amount of financing.

Q. Do you have any opinion, Professor Burton, on whether existing lenders to ABC would or would not be concerned about the possible loss of competitive position to ABC if the additional money which ABC management needed for capital [3104] expenditures were not forthcoming?

A. I believe that one of the factors that they would use in evaluating whether or not the loan was good for the company would be for the company's competitive position. If the money were clearly needed in order to maintain competitive position, it seems likely this would enter into their determination as to the desirability of waiving the restrictions.

[3117]

Q. Professor Burton, would you at the outset please describe in very summary fashion the different natures of the five plans you have devised?

A. These are five plans of financing. The first two plans are debt financing of the entire deficiency with somewhat different repayment schedules.

Plan three contemplates the issuance of a subordinated convertible debenture plus debt financing. Plan four includes both borrowings and the issuance of common stock. And plan five represents the entire financing of the expansion by the issuance of common stock.

Q. Professor Burton, if an independent ABC were determined to enter upon the capital development program reflected in AR-3, in your opinion, what factors would affect the particular choice of plan that it decided upon?

A. Well, there would be a number of factors. There would be problems of the situation in the capital markets at that time. There would be problems of management's willingness to accept risk as opposed to their desire to avoid dilution of earnings attributable to common shareholders.

There would be factors of management negotiating and fund [3118] raising skills which are an important part of any financing package.

Q. Now, we are going to turn to plan one, Professor Burton. Will you describe the plan in somewhat greater detail?

A. Plan one contemplates the borrowing of money sufficient to meet the needs outlined in AR-3. The plan contemplates borrowing these funds on the basis of private placements with financial institutions and bank loans with a six percent interest rate and 10-year maturities.

The 10-year maturities are serial maturities, thus the plan contemplates retirement of ten percent of the outstanding portion of the loans annually. Of course, the actual terms of these issues might vary substantially.

There might be requirement for additional retirements based upon earnings and presumably, also, there would be a variety of restrictions imposed by the banks and financial institutions.

Certainly, dividend restrictions, working capital restrictions would be involved in the issuance of these securities.

\* \* \* \* \*

[3125] A. Plan III contemplates the borrowing of \$70 million through 10-year notes. You will note on the top of page 2 a detail as to how the notes would be paid off. The first note being paid off on a 10-year serial basis and the \$10 million and \$30 million borrowings in '68 and '69 being paid off with a delayed principal repayment.

And then a convertible, subordinated convertible debenture of \$50 million being issued in 1968 which would result in net proceeds to the company of about \$49 million after underwriting commissions.

This plan contemplates a conversion rate fairly close to the market and I have assumed for my calculations a conversion rate of \$70 a share on these convertible debentures.

Then if you move to page 4 of the exhibit you will see the effect of the issuance of these securities on ABC's capital structure and you will note that while it produces debt as a percent of total capital which approaches but is not quite as high as Plan I, at the same time the percent of senior debt would be substantially lower due to the issuance of convertible subordinated debentures.

And then down below you will note the coverage ratios which I have computed on essentially the same basis, once again showing the same pattern of gradual weakening for three years as the borrowing needs of the company are met, '67 through '69 and then improving in 1970.

[3126] The earnings per share figure is computed below on two bases. First on the basis of average shares outstanding during the year and second on the basis of converting the debentures.

Q. Is that converting all the debentures?

A. Yes, all the debentures. Under the recent Accounting Principles Board this will have to be disclosed, so presumably it will have to be disclosed in this fashion even though the debentures were not converted.

Q. You referred to the Accounting Principles Board.

A. Accounting Principles Board Opinion No. 9 which requires the showing of proforma earnings on a fully diluted basis.

Q. Is this a Governmental board?

A. No, this is the opinion of the Accounting Principles Board but the Securities and Exchange Commission has endorsed this and in fact IT&T has had some discussions this year on this particular matter. But that is on a fully diluted basis.

Q. Had you finished your discussion of Plan III?

A. Yes. Once again the advantages and disadvantages I might not have identified specifically.

Q. Will you proceed?

A. The advantages to this plan are that somewhat less risk is assumed by ABC because assuming the continued growth of its business there is a considerable likelihood that these [3127] debentures will be converted into equity and the amount of debt requiring immediate repayment is not as large and thus the cash coverages are perhaps somewhat better.

On the disadvantage side, clearly this does represent some dilution in the equity position of the firm as you could see down at the bottom by comparing the bottom line of earnings per share with the line above it.



Q. Will you turn to page 2 of J-350 and briefly describe the effect on cash in-flow and out-flow of Plan III?

A. Plan III describes in the bottom line, with the lines around it, the 132 and so forth, 132 and 1636, cash in-flows and out-flows, the net cash in-flows and out-flows of the plan. You will note by 1970 under this plan a fairly substantial amount of net cash is being generated due to the relatively delayed repayment schedules contemplated by this plan.

Q. Did you assume, Professor Burton, that ABC would earn any return on this cash amount?

A. No. In this case I did not assume any return being earned on this additional cash amount that would be in the business.

Q. Have you completed your discussion of Plan III, Professor Burton?

A. Yes.

Q. Will you turn then to Plan IV and describe the general nature of that plan?

[3128] A. Plan IV contemplates a mixture of senior debt and common stock as one of the possible financing alternatives for ABC. The plan contemplates borrowings on a senior basis of \$30 million in 1967 with a five-year repayment schedule. The sale of 945,000 shares of stock in the middle of 1968 which would net the company \$60 million after estimated 2½ percent underwriting charge and then additional borrowings to support the cash needs in '68 and '69.

And also in 1970 under this plan with the accelerated repayment of the earlier borrowings, borrowings would be required in 1970 as well. You will note down at the bottom, I call your attention to the fact that the total figures shown there, 492 and 145 do represent negative figures.

So that this plan would not quite finance the needs but should certainly do so within adequate bounds.

If I may go on to the advantages and disadvantages, this plan has the advantage of reducing further the amount of risk, financial risk, that the company faces. It contemplates the issuance of additional equity capital which does have some effect of diluting earnings per share. Once again if you compare Plan III and Plan IV you find that Plan IV represents somewhat



additional dilution of common stock earnings compared to Plan III on a fully diluted basis.

On the other hand, if you look also at the coverage ratios you find that this plan has substantially higher coverage [3129] ratios and thus perhaps would supply more support to lenders and reduce the financial risk which the company would face.

So, this plan moves a little further in the direction of safety and away from risk at the cost of some dilution in the company's earnings per share.

Q. Is there any growth at all in earnings per share?

A. Yes, earnings per share still show a respectable growth from 4.23 to 4.28 in the year that the common stock was issued and once again that is based on average shares outstanding and then continued growth to 4.56 a share and 5.20 a share in 1970.

So the growth is still respectable under these circumstances but particularly in the year 1968 it is modest because of the dilution effect of additional shares being issued.

[3138]

#### TESTIMONY OF ARTHUR LEVEY

By Mr. BAKER:

Q. By whom are you employed, sir?

A. By the Skiatron Electronics and Television Corporation. I am the founder and President.

Q. How long have you been in that position?

A. Since early in 1950.

[3144]

Q. Sir, what was the nature of the business involved in California?

A. Well, this was the largest subscription television undertaking that had ever been established in the history of subscription television. Our exclusive licensees had raised about \$24 million to establish the company in Los Angeles and San Francisco. They had at the time something like 7,000 subscribers with approximately 42,000 signed up.

Q. What was the contractual relationship between STV and Skiatron?

A. The relationship was that STV, which represents Subscription Television, Inc., the abbreviation, they were our exclusive United States licensees for a period of 90 years, expiring March 18, 2053. Skiatron received a royalty on every program that was transmitted. If you want any of the [3145] conditions I will be pleased to elaborate.

\* \* \* \* \*

Q. Mr. Levey, I believe you said earlier that the next meeting with people from ITT was on May 24; is that correct?

A. That is correct.

Q. What was the purpose and substance of that meeting?

A. I brought Pat Weaver over there by arrangement with Mr. Chasen. I recollect at the last moment our general counsel, Kurt Widder joined us. The purpose of that was to give Mr. Chasen and the other officials of ITT the information that they were looking for in respect to the operations on the coast and what we had that we thought would interest them.

Q. What did you have that you thought would interest them?

A. Skiatron had developed the only fully computerized subscription television system by cable that had a two-way [3146] communications capability. In other words, if you were a producer, a program supplier, we could give you the gross receipts within a few seconds. We could also give you the ratings, accurately and completely, not just with a sampling, because we monitor all of the subscribers.

This is most important to continuity of supply in depth because all other systems, Zenith or Paramount telemeters need six to eight weeks to give the program supplier that same information.

In other words, what I am trying to say is that this method that we developed, this system is really indispensable to a prompt response.

Mr. COHN. Mr. Examiner, I object and I move that the remarks be stricken. The witness's characterization that it was dispensable. I have no objection to describing it generally but now he is characterizing it.

CHIEF HEARING EXAMINER. Is that agreeable, sir?

Mr. BAKER. I think the witness is entitled to present his opinion of this system, he has lived with it 10 years, whether it is indispensable. He did not say it is indispensable to what.

I think he should be at least allowed to finish his statement as to what it is indispensable to.

CHIEF HEARING EXAMINER. Will you explain what you meant by that?

[3147] The WITNESS. Yes, I am glad to have that opportunity because I recollect now that actually when I characterized it, or whatever it is termed, we were told, I did not characterize it or have to state what I have just told you, we were told——

Mr. COHN. I object, Mr. Examiner. I object to what he was told.

CHIEF HEARING EXAMINER. By whom, sir?

The WITNESS. We were told by Mr. Chasen.

CHIEF HEARING EXAMINER. Proceed.

The WITNESS. And John Black who was in charge of all CATV activities that the reason why we were asked over there was because on their own investigation of this thing, that their engineers had reported that of all the available subscription television systems only the Skiatron system had a two-way communication capability which they felt was so important.

They told us they were enthusiastic about it.

By Mr. BAKER:

Q. Important for what purpose?

A. Important for the purpose of having a large operation and being able to tell the producers within a matter of seconds instead of six weeks or eight months because as we all know a producers, especially a film producer which makes up the bulk of the programs, they have to know very quickly [3148] after the exposure of the picture how much it has grossed so that they can go back to their bank and so forth and go on to the next picture.

Q. Did anyone from ITT and if you would please identify the person, indicate what ITT wanted to do with this system or

what their plans were or anything which would indicate why they were talking to you?

A. Yes. They certainly did. They told us that they would be interested in this worldwide.

Mr. COHN. Just a minute, Mr. Levey.

Who is "they"?

The WITNESS. John Black in particular said that "they" were the telephone company in Puerto Rico, that they were establishing what he called an information service and they were going to establish a CATV.

He said that he understood that our system is easily integrated into CATV and therefore they believed that they could use the Puerto Rican territory as a pilot operation.

May I just add something to that?

By Mr. BAKER:

Q. If it is responsive to the question.

A. Yes, I believe it is.

At the same time we were told by Mr. Chasen that the operation we had on the Coast he understood from reports that he had, from his own engineers and others, that it could easily [3149] be reactivated because STV had approximately, he knew about the 7,000 drop-ins, he knew that the cables had been maintained by General Telephone in Los Angeles and by Pacific Bell in San Francisco and he knew that we could at very little cost reactivate those and he suggested that we discuss with him what it would take to reactivate that and whether we could leave in, whether we could convert that to CATV as well and leave in the response circuitry so that if and when we got a decision eventually as we felt confident we would from the Supreme Court that this referendum was unconstitutional that we could go back into business.

\* \* \* \* \*

Q. Mr. Levey, did Mr. Chasen express a view on his interest in CATV?

[3150] A. Very definitely. As a matter of fact, Mr. Chasen said and John Black elaborated on it, that they had already spent something like \$10 million invested in CATV, that within a year he felt that they would have something like \$25 million

and that they intended to become the largest in the United States in CATV, that is largest operations.

CHIEF HEARING EXAMINER. Sir, have you set the time of this conversation, sir?

The WITNESS. Yes. That particular meeting, on the 24th of May.

CHIEF HEARING EXAMINER. And the year?

The WITNESS. 1965.

[3201] By Mr. COHN:

Q. Two final questions.

Did Skiatron participate in the presently pending proceedings before the FCC on pay television?

A. Yes, we filed a brief, yes.

Q. How long to your knowledge has the litigation concerning pay television been going on before the FCC and in the courts on the question of whether or not the Commission should authorize pay television?

A. How long it has been going on?

Q. Yes, approximately.

A. We filed our first brief in 1954. I should say it has been going on for at least 12 or 13 years.

Q. As of today, the Commission has never adopted any rules authorizing pay television except on an experimental basis; isn't that correct?

Mr. MARINO. Objection; irrelevant.

CHIEF HEARING EXAMINER. What is the relevance?

Mr. COHN. I can hear the Justice Department alleging that ITT did not embrace Skiatron and take all of these wonderful opportunities for immediately going into pay television and establish what they would allege would be a competitive television system.

I think it is important that this record demonstrate that this litigation has been going on for a period actually of [3202] more than 13 years and even as of today, the Commission has never adopted any rules which permit pay television broadcasting except on an experimental basis.

Mr. GORDON. I think that the Commission's files show the status of the pay TV. I don't think it is a litigation matter. I think——

CHIEF HEARING EXAMINER. The present status and the history of litigation.

Mr. COHN. I will withdraw the question as long as we may take official or judicial notice of the history of pay television in its various forms before the FCC, their present status and whatever rules the Commission has adopted as of today concerning pay television insofar as the experimentation of that particular system.

[3214]

TESTIMONY OF TED B. WESTFALL

By Mr. FITZPATRICK:

Q. Are you an official of the International Telephone Company?

A. Yes, sir, I am executive vice president and a director.

Q. What are your duties as executive vice president and director?

A. I am a group executive. I have general supervision over our international communications operations, our US telephone operations, and our North American telecommunications manufacturing operations.

Q. Does the operations of the Press Wireless come under your direction and supervision?

A. It does.

Q. Does the operations of ITT come under your supervision also?

A. ITT Worldcom, yes, it does.

[3243]

By Mr. GORDON:

Q. As such an owner and holder of a little more than 10 percent of the stock of ComSat, ITT elects two of the directors of ComSat, is that correct?

A. That is correct.

Q. Are you one of those two directors?

A. I am.

Q. Who is the other, sir?

A. Mr. Eugene Black.

Q. As a director of ComSat and at the same time you are director and officer of ITT, as a director of ComSat when you vote on problems coming up before the ComSat Board does there come a time when problems arise where you feel there may be some differing points of views or conflicts as between ITT and ComSat?

A. Yes, sir.

[3244]

Q. When such conflicts or differing point of views arise before the ComSat Board do you find that your primary allegiance is to ITT or to ComSat?

A. As a director of ComSat my allegiance is to ComSat. [3245] Where there is a conflict between ComSat and the carriers—it is usually the whole group of carriers—these are generally issues that will be settled by FCC, we absent ourselves from the room.

Q. I am afraid you are not responsive to my question.

Mr. COHN. I thought the Department wanted all the relationships between ITT and ComSat on this record.

CHIEF HEARING EXAMINER. I will let the answer stand. I will ask counsel to proceed further.

Mr. GORDON. Will you read the answer back, please.

(The answer was read by the Reporter.)

By Mr. GORDON:

Q. If your primary allegiance is to ComSat rather than to ITT, why do you feel it necessary to absent yourself from the room?

A. I said that my primary allegiance as a director of ComSat is to ComSat.

Q. Excuse me, you are also a director of ITT, are you not?

A. That is right.

When there is a conflict between those two then I absent myself from the room. When I am voting as a director of ComSat my allegiance is to ComSat.

Q. Is your primary allegiance when you are voting on matters that appear before the ComSat Board to act in the [3246] best interest of ComSat and its stockholders?

A. Absolutely and that I do.

Q. Yet you feel it necessary to absent yourself from the room when there may be a conflict between what is proposed before the ComSat Board and what ITT's position might be?

A. As I said before, these are issues which either have been or will be before the FCC.

Q. It is irrespective of whether it comes before the FCC?

CHIEF HEARING EXAMINER. Excuse me, sir.

I think the question has been answered.

His position has been explained. Where the conflict arises and the FCC would not be involved the witness would leave the room and presumably would not vote, would not participate.

Is that your statement, sir?

The WITNESS. That is absolutely correct.

CHIEF HEARING EXAMINER. I thought that was clear on the record, Mr. Gordon.

[3247] By Mr. GORDON:

Q. Can you give us instances of conflicts that have arisen where you have excused yourself from the ComSat room when they were voting on matters before the ComSat board?

A. Yes, sir, there have been a number of meetings in which the board was considering its position with respect to the authorized user problem.

There have been a number of meetings in which the board was concerned with the position it should take as to who should own the ground stations in both of these particular sets of major policy matters, the carriers have been in disagreement with ComSat.

Q. The carriers including ITT?

A. Including ITT.

[3248]

Q. You are a director of some of the international communications carriers within the ITT family, are you not?



A. Right.

Q. And some of those are ITT WorldCom, is that right?

A. That is right.

Q. AC&R is another one?

A. Right. I do participate in discussions as to the position we take before the FCC, as ITT.

Q. But my question is, suppose ITT WorldCom board of directors or AC&R board of directors is presented with a problem as to authorized user and ground station ownership, do you absent yourself from those board deliberations when those problems come up before them?

A. There have been no board deliberations on those issues. As part of the management, I participate in the discussions on those issues.

Q. You do not leave the room?

A. No, I do not.

Q. In those deliberations, are you arguing—do you advance the ComSat point of view or do you advance what is best for the interests of ITT, AC&R and WorldCom?

A. In those particular issues, I am advancing the [3249] position of ITT WorldCom.

Q. Are there any occasions, sir, when conflicts may arise between ITT companies of which you are a director?

A. Yes. They are rare, but they happen.

Q. Can you give us an example of some of them?

A. There are varying types of conflicts, some of which are in my own group, we have a difference of opinion as between the managers of the international communications operation and the local telephone company as to the volume of traffic and how much they should spend for additional equipment and this sort of thing. These, I settle.

Q. You mean an ITT company that may be owned and still operates a telephone system?

A. That is right.

Q. These would be telephone companies in Puerto Rico, sir, or Virgin Islands?

A. Then there are disputes between, let us say, one of my companies and one of the other companies on a purchase and sell arrangement and there is some difference of view as to the

exact terms, they weren't clear, there was a dispute, in which case we ask the Comptroller's Department to step in and ascertain the facts and pass judgment on it.

Q. This is the Comptroller's Department of ITT?

A. Yes.

Q. Headquarter's interest.

[3250] A. Yes, in consultation with the Comptrollers of the individual companies.

Q. I believe you mentioned that if differences of opinion or disputes arise between an ITT telephone operating company and an ITT international carrier, that you settle those disputes, yourself?

A. Right.

Q. How does that come about? Are you a director of, say, the local telephone operating company which is an ITT subsidiary?

A. No. In some cases, I am, yes.

Q. Do I understand that when you do settle those disputes, yourself, you do that as the group executive and executive vice president of ITT, do you not?

A. Exactly. Some of our operations, particularly in the U.S., are operated in the same manner as though they were divisions.

Others of them, particularly in the foreign area, are operated on an entirely different basis where they have local boards of directors that make their own decisions. So it varies with the situation.

Q. I see. But when disputes arise and somebody has to settle them, they funnel up to you if they are within your group?

A. That is right.

[3251] Q. Does there come a time when disputes may be so serious that you, as executive vice president and one of the group executives, in ITT headquarters will take the matter up with the ITT top board of directors or executive committee?

A. No, I don't recall any such case.

Q. But that could happen if the dispute is serious enough?

A. I suppose so.

[3263]

## TESTIMONY OF ELMER W. LOWER

By Mr. TIERNEY:

Q. Will you be good enough to give your full name and address?

A. Elmer W. Lower, President of ABC News. My home address is 353 West 86th Street, New York City.

[3265]

Q. Would you be good enough again and you can be as detailed as you care to, but as brief as you possibly can, to giving details, give us the metes and bounds of your duties and responsibilities as president of the ABC News, Special Events and Public Affairs Department?

[3266] A. I am responsible for both the radio and television sides of the house. Our radio and television networks operate separately but the news departments are all under me. So, I am responsible for all the so-called hard-news programs on a daily basis, the documentaries, the religious programs, the panel discussion programs of a political nature like "Issues and Answers."

Q. When you are talking about responsible, you mean supervisory responsibility, is that right?

A. Yes.

[3271]

Q. Would you be good enough if you can, Mr. Lower, if there is a policy with respect to your responsibilities as the president of the news department that there is a written formal policy of the ABC, Inc., with respect to the metes and bounds of your, if I may use the term, autonomy?

Will you articulate that policy if you can?

[3272] A. The policy appears in the ABC policy book. Simply stated, it places me in charge of all news and public affairs, documentary and special events programs.

Q. It places you in complete charge, is that right?

A. The contents, certainly.

Q. In other words, you are saying that the policy gives you the decision-making power with regard to coverage and reportage, if I may use those terms?

A. It certainly does.

Q. Now, we went into this somewhat with Mr. Goldin when he testified. Suppose there is a matter, a serious matter and there is a dispute within the organization as to whether or not you will have not only coverage, but reportage of a particular matter.

And you cannot resolve it at your level—where do you go?

A. The buck stops with me on that question, Mr. Tierney. If there is a dispute about coverage, this is my problem, it is not Mr. Goldenson's or Mr. Siegel's.

[3273] Q. Is the coverage of a topic let us say or an area?

Do you understand my question?

A. Yes, sir.

The coverage of a story like if a reporter is here covering the event here today, I am responsible for that and it goes no further. Whether the reportage gets on the air or not is also under me but probably would be up to the producer of the program.

Q. Suppose someone at your level in the company, there must be other people at your level I would imagine, in your area thought that perhaps you should cover something and you think you should not, where do you go from there?

A. We wouldn't go anywhere. This is our decision. But if another official felt strongly enough about this I suppose he could protest to Mr. Siegel and he could ask me to come and discuss it.

Q. Mr. Siegel is what?

A. Executive Vice President of American Broadcasting Companies, Inc.

Q. Does he have any power in any sense of vetoing your decision?

A. He is my boss. He can always veto me. He has never done it.

Q. I am not asking whether he has ever done it. But he has the authority?

[3274] A. As my boss, yes.

Q. Does it stop there in the event the dispute is carried on? was dead wrong I could go to Mr. Goldenson on something.

A. I think practically speaking if I have authority Mr. Siegel

Q. So I presume the buck ends with Mr. Goldenson?

A. Yes.

Q. Even with all of your responsibilities?

A. Yes.

Q. Again directing your attention to this chart that we have been discussing, Mr. Lower, will this chart in any way change under a merged ABC-ITT?

A. Not to my knowledge.

Q. Will the reporting chain that we have just been through change in any way as a result of a merged ABC-ITT?

A. Not to my knowledge.

Q. Would there be different personalities that you would have to go to for final decision under a merged ABC-ITT?

A. No.

Q. How about in the matter of budget?

A. You mean under a merger?

Q. Yes.

A. No, I still would go to Mr. Siegel.

[3276]

Q. Are you aware of the fact that ITT has worldwide holdings?

A. I have just read generally about it.

Q. Could I direct your attention to Attachment A to the dissenting opinion of Commissioner Bartley that was part of the memo opinion and order of the Commission in these proceedings on December 21, 1966.

Let the record show I am showing the witness Attachment A to Commissioner Bartley's dissent to the Commission's memo opinion and order of December 21, 1966.

Have you seen this document before?

A. Not this list, sir, no.

Q. I want to use this in a little examination. This is already in evidence. Now, Mr. Lower, you mentioned a few moments ago I believe that you have Bureaus and operations all throughout the world. Is that correct?

A. Well, Bureaus or stringers, yes. Stringers are generally part-time employees.

Q. I obviously am not going to read this entire list but I want to check with some of these countries throughout the world and see where your bureaus are located.

Do you have a bureau in Canada?

A. No.

[3277] Q. Do you have one in Jamaica?

A. No.

Q. Do you have one in Mexico?

A. No.

Q. Do you have one in Panama?

A. No.

Q. Do you have one in Brazil?

A. No.

Q. Do you have one in any part of Latin America?

A. No. Our Latin American coverage, our man who was a specialist in that bases in Miami because the air service is better and he fans out to Latin America from there.

Q. Do you have a bureau in Algeria?

A. No.

Q. Austria?

A. We have a retainer man there, Russ Jones.

Q. How about Belgium?

A. No.

Q. Denmark?

A. No.

Q. Finland?

A. No.

Q. France?

A. Yes.

Q. You have one in France?

[3278] A. Yes, sir.

Q. Do you have one in Greece?

A. No.

Q. The Netherlands?

A. No.

Q. Nigeria?

A. No.

Q. How about any part of Africa?

A. None.

Q. How about Portugal?

A. None.

Q. Going to the Far East——

CHIEF HEARING EXAMINER. Excuse me, sir.

Would it be better for you to ask him where he has them?

Mr. TIERNEY. Your Honor, that reminds me of the question I put to you earlier if you had asked the question the way I liked it I would have been more satisfied. I certainly can do it the other way.

CHIEF HEARING EXAMINER. Whatever way is the most expeditious.

By Mr. TIERNEY:

Q. Is this too hard on you, Mr. Lower?

A. No, it is not taxing me at all.

CHIEF HEARING EXAMINER. Proceed.

[3279] By Mr. TIERNEY:

Q. Do you have any bureaus in the Far East?

A. Yes.

Q. Where are they located?

A. Tokyo, Hong Kong and Saigon.

Q. You do, of course, have a bureau in Germany, do you not?

A. Yes, sir.

Q. Where is that located?

A. It has been in Berlin. At the moment we are about to shift it to Bonn because it is easier to operate there and better.

Q. Do you know that ITT has a large business enterprise in Germany?

A. I was not aware of that.

Q. Now, Mr. Lower, do you in addition to having your own reporters and stringers, et cetera, also buy news service?

A. Yes, sir.

Q. And you buy news service from whom?

A. Associated Press, United Press, Reuters, and New York Times.

Q. Did you ever buy any news from foreign press agencies?

A. We do not. Well, Reuters is a British agency.

[3282]

Q. Mr. Lower, it has been testified to in this record and many, many times before the Commission in the program inquiry, Docket 12782, the program inquiry, that this is normally required a lead time of about 18 months with respect to programming.

This is particularly in the area of entertainment programming. Do you have that same lead time requirement as far as public affairs programs?

A. Only certain of the public affairs programs, Mr. Tierney, the documentaries, the planned documentaries.

Q. Planned documentaries?

A. The long-range ones. The ones that do not have an immediate—the ones that are not of an immediate nature.

Q. Who actually selects the topics that are going to be programmed let us say a year or 18 months in advance. Give us the various steps in the selection and the ultimate exhibition or broadcast of a public affairs program.

A. Yes. The staff under me and under Tom Wolf, who is Vice President and Director of Television Documentaries, that is his sole responsibility, we are working all year and [3283] looking for new ideas for programs that will be good anywhere from 12 months to 24 months in advance. We turn a lot of ideas down and we finally come up with a few.

Then we try to interest the sponsors in sponsoring those programs.

Q. Within your organization, when you make a selection of the programs, apparently you have to go to someone to get the necessary funds for those programs. Is that correct?

A. Yes.

Q. In other words, you have to budget them?

A. Yes.

Q. Where do you go for your budget if I may use that term?

A. Eventually Mr. Siegel.



Q. What would you say to Mr. Siegel? Would he ask you with respect to the programs, the character, their theme, their contents?

A. No.

Q. He would only be interested in what?

A. The total dollars involved and the total hours to be pre-empted on the air.

Q. You don't have to go before the Board of Directors?

A. No, sir.

Q. You never have to go before the Board of Directors for your budget?

[3284] A. No, sir.

Q. In other words, the only person that you bring your entire news and public affairs budget to is Mr. Siegel, is that correct?

A. That is correct with the exception of perhaps a large project like the Africa Project which took an unusual amount of money. I believe that was presented at the Board by Mr. Moore because he is a member of the Board.

At any rate, that is the only one I know that has ever gone before the Board.

Q. In other words, you say generally speaking you stop at Mr. Siegel?

A. That is correct.

Q. But in the event of a large project you would go higher, is that correct?

A. That would be his decision whether to go higher.

[3286] \* \* \* \* \*

Assuming it is a matter of vital importance, a Senate hearing, or something of this nature, and you had to have coverage or reportage and coverage if there is a distinction, for four or five hours a day, would that decision be yours or who's decision?

A. I would first try to work that out with the [3287] television network.

Q. Who is that?

A. Mr. Tom Moore is President of it. If he and I agree on it we would go ahead and do it. If we disagreed we would go to Mr. Siegel.

Q. Suppose Mr. Siegel did not decide the matter?

A. It would go to Mr. Goldenson.

Q. He would make that determination?

A. If Mr. Siegel could not resolve it.

Q. Has it ever happened during your tenure?

A. It has not. I don't know what Mr. Siegel talks to Mr. Goldenson about.

Q. As to your responsibilities you would have to know that, would you not?

A. No, sir.

Q. As to all the matters of news, public affairs and speaking events?

A. Mr. Tierney, my boss is Mr. Siegel. I have been in the business too long, worked for too many organizations and I have learned not to go over my boss' head except on matters of great principle.

Q. Has there ever been an occasion where you and Mr. Moore have gone to Mr. Siegel with respect to a matter?

A. Yes.

Q. Could you describe some of those incidents?

[3288] A. I think the first year I was at ABC I wanted to put on more documentaries than Mr. Moore wanted to. We went and argued it out with Siegel and reached a modus operandi.

Q. Did you win out in some of the argument?

A. I won some and lost some.

[3290]

By Mr. KESTENBAUM:

Q. There was a question that Mr. Tierney asked you about the annual budget of your department. I believe it was in the course of Mr. Siegel's testimony and this is at page 2575 of the record in which he made the observation that once a year the budget is approved at the beginning of the year in a lump sum.

[3291] This is referring to the budget of your department. He was referring to approval by the Board as I recollect. The budget that Mr. Siegel was referring to, do you help prepare that?

A. Yes. Robert T. Goldman, Vice President and General Manager of ABC News who works directly under me is responsible for it but I am working with him throughout the period that he is preparing it.

Q. In what detail is it broken down in terms of activities and programs?

A. He has a fairly detailed breakdown on it.

Q. You say you have never discussed that yourself with the Board?

A. No, sir.

Q. Have you ever made an annual budget proposal which was modified or altered or cut down by the Board?

A. No, I have not.

\* \* \* \*

[3294] \* \* \* \*

Q. According to my notes in response to a question about documentaries you state that your staff and your people try to think of ideas and then you said something about looking for a sponsor?

A. Yes, sir.

Q. How is that handled?

A. Once or twice a year we will prepare a rather attractive book describing the program and maybe illustrate it with a few photographs or drawings. We will visit a sponsor and show him a good many ideas that we think will make interesting television programs and which are worth doing for the American public.

Q. How far along has the idea gone when you have that book prepared?

A. Ninety percent of the time not out of the paper stage, out of the research stage.

Q. The book will contain ideas and pictures?

A. Yes.

Q. You don't have anything like a shooting script or anything like that?

A. No, not at that point.

[3295] Q. Who makes these presentations that you described?

A. I go along. Tom Wolf, Vice President in charge of Television Documentaries, goes along, and Bill Furman who I believe is called director of sales for news, for the television network.

Q. You discuss with the sponsors or with the prospective sponsors the plan or the idea of the program and what you expect will be the content of this program; is that correct?

A. It is a general description. Usually on one or two type-written pages or printed pages.

Q. Do you select your prospects with some eye to the nature of the content of this program?

A. No, we do not, Mr. Kestenbaum. There are not many prospects in this field.

Q. What I mean is, would you go to a cigarette company with a proposed hour documentary on lung cancer?

A. No, we would not.

Q. There is certain economic reasonableness that goes into this project?

A. That is right. There are not many companies that are interested in sponsoring documentaries so the field is quite limited.

Q. You try to get one sponsor for this kind of show?

A. That is the best way to do it but we don't foreclose it at that.

[3296] \* \* \* \* \*

Q. In this documentary or public affairs aspect of your department have you gotten ideas from outside your department from other parts of ABC or from outside companies?

A. Yes, we occasionally do. They come from a variety of sources. People know we do these and naturally they submit ideas to us. They come from both inside and outside.

Q. Do you think they come from ideas suggested to you by Mr. Goldenson?

A. Yes. He suggested one sometime back which I had [3297] been wanting to do for some time on Red China. He has suggested one on nurses recently.

Q. How about Mr. Siegel, has he made suggestions of a similar nature?

A. Not too often.

Q. Can you think of any of his?

A. He asked us to investigate one on the trust territories.

Q. We asked him about that when he was down here. He said you never did that show.

A. No, it has not been done.

Q. How far along did you get?

A. We did a little research on it.

Q. Did you make a presentation like the one you described?

A. I believe it was included in a book that was presented to the 3-M Co.

Q. That particular book contained several——

A. It had about 50 ideas in it.

Q. Did any of those ideas come to fruition with 3-M?

A. Yes, they selected, I believe it was eight or nine out of that book.

Q. Have any of these been telecast yet?

A. No. That would have been November. I suspect they will be ideas coming up for the fall and spring season of [3298] '67-'68.

[3299]

By Mr. McKenna:

Q. Now I don't think the record is quite clear, Mr. Lower, as to the extent of authority, if any, Mr. Siegel has in what is broadcast and not broadcast over the air in the areas of hard news and documentaries.

Would you please state for the record what the situation is on that?

[3300] A. Other than the fact that he is the boss, the operating boss of the organization, he has no specific authority to tell us what news to put in the hard news programs.

Q. Who does have the final decision on what news appears in the hard news programs?

A. I do.

Q. The final decision?

A. I do.

[3301] Q. Now, who has the final decision as to what documentaries are or are not to be carried on the network?

A. I think that is my decision.

Q. Sir, I am going to read you an excerpt from an article that appeared in the Wall Street Journal on April 14, 1967 and ask if you agree with what is here stated and I quote:

In an interview outside the hearing room, James C. Hagerty, an ABC vice president, who formerly directed its news operation, said he would resign if he ever thought ITT was influencing ABC's news policies. "There would be mass resignations", said Mr. Hagerty, White House Press Secretary under President Eisenhower and the man who hired many of ABC's top newsmen, "But I know it is not going to happen. Honorable men have pledged that it won't". He added, "Anyone who thinks otherwise just does not understand the news profession," which, he said, "is made up of proud and dedicated people who won't stand for monkey business".

Do you agree with that statement?

Mr. KESTENBAUM. I object to the question, Mr. Examiner. I presume you could ask the witness about what his own intentions or his own feelings are on the subject.

He can't ask for agreement about honorable gentlemen and all the rest of the statement.

CHIEF HEARING EXAMINER. I think that would be a proper [3302] suggestion.

By Mr. J. McKENNA:

Q. I think Mr. Lower can carry it on from there.

Mr. KESTENBAUM. If the question is rejected, I think you should reframe the question.

By Mr. J. McKENNA:

Q. Mr. Hagerty has expressed this view. Would you differ with that view?

Mr. KESTENBAUM. I object to the question about the interview.

CHIEF HEARING EXAMINER. I will overrule the objection.

The WITNESS. I agree with that view, yes.

By Mr. J. McKENNA:

Q. If anyone were to tell you what to put on in the way of news or what not to put on, would you resign?

A. Yes. The only amendment I make is that I think I would know about it before Jim Hagerty did and I would be out of the door ahead of him.

[3313]

#### TESTIMONY OF THOMAS W. MOORE

By Mr. TIERNEY:

Q. Let me see if I can sharpen it a bit. Within the metes and bounds of your authority, Mr. Moore, is it within your responsibility to place the actual news and public affairs programs in specific time periods?

A. That is correct.

Q. Is this the area in the event there is a dispute between yourself and Mr. Lower, where you would have to go to someone else for determination and decision?

A. That is correct.

Q. Now, Mr. Moore, I think it has been testified to in this record by Mr. Goldenson, that generally speaking, in that area of entertainment programing, you require something in the neighborhood of 18 months' lead time, is that correct?

[3314] A. That is approximately correct, yes.

Q. In other words, in the present posture, you are actually planning 18 months from now?

A. That is correct.

Q. Speaking just in terms of the '67-'68 programs of ABC, what would be the round figures of the total purchase requirement for the entertainment programing of ABC?

A. Film programs cost approximately \$165,000 to \$170,000 an hour. Taped programs are slightly less expensive. There are

certain game type shows—I am talking now about nighttime programing—that are in the area of——

Q. I am just looking for a total figure of how much is required for a season's programing in the entertainment area for ABC.

A. You are talking only about nighttime programing or are you talking day and night?

Q. Whatever your purchases are. Is that a hundred million dollars?

A. It would exceed that slightly.

Q. Fine. That is all I am looking for at the moment. Now, directing your attention to a document marked Attachment C to ABC's application in these proceedings—do you have a copy of that?

A. Yes, I do.

Q. I am referring to the very first page. I will read [3315] it and you tell me if I am reading it correctly.

Following the merger of ABC and UPT in 1953, the ABC television network began a program of development and expansion which has resulted in its moving from a poor third position to a competitive position with the other two major networks.

Is it your testimony now that you are a full competitor with CBS and NBC?

A. Yes, we would be a full competitor of NBC and CBS. We are not the absolute equal of those two networks.

Q. Fine. I think the answer is yes. I will get to the other later.

Now, what has been the principal factor in your position from poor third to a competitive network today with your opposition, if I may use that term? Has it been your programing?

A. Yes.

Q. Doesn't ABC have the public reputation in your business of being an innovator?

A. That is correct.

Q. Were you an official of the network when a policy or a practice was determined in efforts to become more competitive to counterprogram?



A. Yes, I was an official.

Q. Was counterprogramming a factor in increasing your position vis-a-vis your competition?

[3316] A. I would say it was, yes.

Q. Will you tell us what counterprogramming is, for the sake of the record?

A. It is to afford the viewing public an opportunity for programming, for a type of programming other than that which is on the other networks. By that, I mean that if a network is programming action and another one is programming a movie, perhaps musical variety would be the kind of programming for us to go to since it would afford a different kind of programming for that given time.

Q. Were you not, and when I say "you," of course I am talking about ABC—were you not also an innovator in the development of the one-hour programming format? Was Maverick such a program?

A. Yes. We had perhaps more hour programs in the advent of the hour as a form than perhaps the other two networks. I am not familiar with the exact statistics but I believe we would have been considered a factor in increasing the number of hour-long programs, on nighttime.

Q. As a result of your experience in counterprogramming, and as a result of your past experience and your ingenuity in management, would programming more attractive programming of the counterprogramming variety be a factor in maintaining a status quo with your competition and, perhaps, exceeding it?

A. Programming is an essential factor, yes.

[3317] Q. Has it been your experience, let us say, in recent months, that through programming decisions or programs which you have broadcast, that you have in fact exceeded your competition in the number of homes that a program is received?

A. In certain specific time periods, that is true, but on the average for the average homes viewing nighttime television, it is not true.

\* \* \* \* \*

[3334] By Mr. KESTENBAUM:

Q. Mr. Moore, there was one question that I asked Mr. Goldenson which he referred to you.

I inquired of him whether he could tell you whether UHF stations had been declined in communities where there are only one or two VHF stations and ABC had no affiliates. To refresh his recollection I handed to him this list of cities and towns where UHF affiliation requests had been declined by ABC since 1-1-63.

It is not in the record but he suggested you could answer the question. If you will refresh your recollection from that list and if you could give us the answer to that question I would appreciate it.

A. I cannot address myself to each one of these markets but there have been affiliations refused to UHF stations in one and two VHF station markets.

Q. Would you say there has been a substantial number of such refusals or small number?

A. I would say that perhaps there have been ten or a dozen.

Mr. KESTENBAUM. Mr. Examiner, I think to make this point or to complete the record on this questioning I would like to put this list which we have obtained from your company or your counsel in the record.

Mr. J. McKENNA. We have no objection.

Mr. KESTENBAUM. Let me give you a number and they will

[3335] reproduce it during the noon hour.

CHIEF HEARING EXAMINER. Very well, sir.

If you will give us a number it will be admitted at this time.

Mr. COHN. Mr. Examiner, could I inquire of Mr. Kestenbaum how much more he has.

CHIEF HEARING EXAMINER. I think he is about through with the witness.

\* \* \* \* \*

[3378] TESTIMONY OF PAUL E. SONKIN

By Mr. J. McKENNA:

\* \* \* \* \*

Q. What position do you hold with ABC?

A. Director of Research for the television network.

[3381]

Q. Mr. Sonkin, there has been testimony in this record to the effect that there have been times when ABC was virtually tied with NBC and CBS in audience during the prime viewing hours.

Mr. GROSSMAN. Would you identify that?

Mr. J. McKENNA. That appeared in the record at 771, Mr. Kestenbaum's examination of Dr. Saulnier.

By Mr. J. McKENNA:

Q. Sir, are you familiar with the average number of homes served by the average line-up of ABC affiliates during prime viewing hours as compared with the number reached by the average NBC and CBS line-ups during these hours?

A. Are you referring to the live—are you referring to the average program or principal affiliates?

Q. The average program.

Mr. GROSSMAN. What period?

Mr. J. McKENNA. Prime viewing hours.

Mr. GROSSMAN. What year?

Mr. J. McKENNA. Let's take 1966.

The WITNESS. Our average line-up in prime evening time is roughly about 176 stations, counting live plus delay, and roughly about 96.8 percent of U.S. TV homes. The average CBS line-up is about 186 stations, roughly 98 percent of TV homes, and the average NBC line-up is 189 stations, roughly 97.8 [3382] for NBC.

[3385]

Q. Mr. Sonkin, are you familiar with the difference between a primary affiliation and a secondary affiliation?

A. Yes, I am.

Q. Will you explain it for the record, please?

A. A primary affiliation is where the network has a standard agreement with the station where the station usually accepts or has the right to accept most of the network's programs, and it

is usually in an area where there is more than—where there are at least three or more station facilities.

A secondary affiliate is where the network usually offers a slate of programs to a station and the station usually picks or chooses one or two, or three or four programs to put on their schedule, and this station is usually primarily affiliated with either one or the other networks.

Q. Are there advantages to a network in having a primary affiliation instead of a secondary affiliation?

A. Yes, there are.

[3386]

Q. The question was what are some of the advantages?

A. Some of the advantages of having a primary affiliation is the affiliate usually supports the network to a greater extent than a secondary affiliate.

Mr. KESTENBAUM. Mr. Examiner, even if he is an expert on what the contracts say, he can't be an expert on what stations usually do. I don't see how he can be an expert on that.

CHIEF HEARING EXAMINER. I think he is in a position to know. Maybe it will appear later and maybe not. This is the position and view of ABC. He is their spokesman in this matter.

[3387] Mr. KESTENBAUM. That could have been developed through the people who run the network. They are putting on a possible statistician to tell us about matters apparently beyond his experience and qualifications.

CHIEF HEARING EXAMINER. I will overrule the objection. Let counsel proceed, subject to a motion to strike.

By Mr. J. McKenna:

Q. Will you continue, Mr. Sonkin?

A. Yes. With a primary affiliate, we find that we usually get a lot of support, particularly in the news area and in the day-time, two of the areas where ABC is most deficient in getting clearances.

Mr. GROSSMAN. Most efficient?

The WITNESS. Most deficient in getting clearances.

The primary affiliate will tend to support the network more in these areas than a secondary affiliate will.

CHIEF HEARING EXAMINER. Sir, let me ask a question, if I may.

Are you testifying from your own experience with ABC in this regard?

The WITNESS. Yes, sir; strictly experience.

CHIEF HEARING EXAMINER. Proceed.

I mean your own day-to-day experience.

The WITNESS. That is right.

CHIEF HEARING EXAMINER. Proceed.

[3388] The WITNESS. Also, prior to the season, when we meet with our affiliates, we develop promotional—our promotion for the following season and these affiliates support us in the area of promotion where the secondary affiliate usually doesn't.

Mr. GROSSMAN. Mr. Examiner, I think I will object to that unless it is indicated that the witness himself personally meets with the affiliates.

Mr. J. McKENNA. I think that would be a proper question.

The WITNESS. We have usually two meetings a year with our affiliates, one in the June period and one during the NAB convention.

By Mr. J. McKENNA:

Q. Do you attend those meetings?

A. Yes.

Q. Do you make presentations at those meetings to the affiliates?

A. Yes.

CHIEF HEARING EXAMINER. Do you withdraw your objection?

Mr. GROSSMAN. Yes, sir.

CHIEF HEARING EXAMINER. Very well.

The WITNESS. In most of the two-channel markets or the markets where we do not have a basic or primary affiliate, our promotion is almost nonexistent in these markets.

[3394]

Q. Mr. Sonkin, there has been testimony about the differences between delayed broadcast and live clearances. What are some of the disadvantages of delayed broadcast over live clearances?

A. Some of the disadvantages are in the live time period when we schedule programs, when all networks schedule programs, they normally schedule based on what the competition has. In other words, we try to counter the program of the competition. We also try to place the program behind another show where the audience flow will be compatible so that you get a compatible audience flow from one program to another.

That is one variation.

The second variation is that usually a program, for example, that is scheduled at an 8:30 or 9:00 o'clock time period will be presented at a certain audience potential, in the period of certain audience potential. If it is delayed into a 6 o'clock or 7 o'clock time period the audience [3395] potential is far less.

Q. I ask you to refer to AR-67. Does this exhibit show the number of TV homes that are tuned in at the various half-hour segments during evening prime time?

A. Yes, it does, for the average of January-December 1966.

Q. And would it show the disadvantage in obtaining a delayed clearance, say—

Mr. GROSSMAN. I object as leading.

Mr. FITZPATRICK. Objection.

CHIEF HEARING EXAMINER. Sustained.

Mr. J. McKENNA. Mr. Examiner, the exhibit obviously speaks for itself.

CHIEF HEARING EXAMINER. Very well.

By Mr. J. McKENNA:

Q. Mr. Sonkin, in terms of TV homes reached, if a show was scheduled in live time between 9:00 and 9:30, but instead is broadcast between 7:00 and 7:30 p.m., what is the disadvantage?

A. On a national basis roughly six million homes.

Q. And that information can be obtained from AR-67, is that correct?

A. That is correct.

Q. Are you familiar with the practices being followed by the three networks in supplying color prints for delayed [3396] broadcast?

A. I am not 100 percent sure of CBS and NBC.

Q. Let us talk about ABC.

A. Yes.

Q. What is ABC's practice?

A. ABC's practice starting with January of this year has been to supply a color print to all stations who clear the programming between the hours of 6:00 and 11 p.m.

Q. And what is the reason for that practice?

A. The reason for that practice is to try and get as many stations to carry our shows as possible. Since the advent of color, many of the two-channel markets have refused to take our shows because of the fact we were sending around black and white prints and color is one of the important factors now in getting a program cleared in most of these markets.

[3438]

Mr. J. McKenna. I offer AR-63.

CHIEF HEARING EXAMINER. Any objection?

Mr. Grossman. I have some qualifying questions.

CHIEF HEARING EXAMINER. Proceed.

Mr. Grossman. Mr. Sonkin, when you were preparing Attachment A, what was your understanding of the purpose of this Attachment?

The WITNESS. It is intended to show that if ABC had the same homes delivery as the average of CBS and NBC these are the dollars we would have been able to gross.

Mr. Grossman. Homes means actual homes tuned into the station?

The WITNESS. The average minute between 7:30 and 11, Monday through Sunday, yes, sir.

Mr. Grossman. What principal factors go into the question of how many homes are delivered at a particular time?

The WITNESS. What principal factors?

Mr. Grossman. Yes.

The WITNESS. The programming that is offered and the station lineup over which it is offered. Basically, two factors that go into the eventual home delivery.

Mr. Grossman. It is your understanding that Attachment A does not in any way attempt to break down the effect of these two factors?

[3439] The WITNESS. No.

Mr. GROSSMAN. You cannot tell from Attachment A how much of the difference between, say, ABC and CBS is due to differences in station lineup and how much is due to differences in popularity in the program, is that correct?

The WITNESS. That is correct. However, the Nielsen 30 Market Report which is a measure of a station's performance—

Mr. KESTENBAUM. I think you have completed your answer. This is another subject, Mr. Sonkin.

Mr. J. McKENNA. I don't believe it is.

Mr. KESTENBAUM. He was asked about his intent in preparing this document.

CHIEF HEARING EXAMINER. Do you object to this explanation?

Mr. KESTENBAUM. He is attempting to introduce another subject which his own counsel wants to elicit from him.

CHIEF HEARING EXAMINER. It seems like something foreign to the original question, Mr. McKenna. I will sustain the objection.

Mr. GROSSMAN. Now am I not correct, Mr. Sonkin, that looking at page 1, Attachment A, that proceeding in exactly the manner in which you have proceeded here you could also compute that NBC had a certain disparity in its average cost per minute?

The WITNESS. Based on these figures, NBC sold at \$40,300 a minute and CBS sold at \$38,300 a minute.

Mr. GROSSMAN. So you could, could you not, based on the [3440] reasoning that you followed in this exhibit, Mr. Sonkin, compute that if CBS had sold each minute for \$2,000 more equal to the amount for which NBC sold its time, that it would have received a certain amount additional revenue?

The WITNESS. If you compute it that way, yes.

Mr. GROSSMAN. Incidentally, Mr. Sonkin, when did you prepare this document?

The WITNESS. I believe it was a few weeks ago.

Mr. GROSSMAN. Before the hearing began?

The WITNESS. Yes, this was done before the hearing.



[3505]

By Mr. GROSSMAN:

Q. Mr. Sonkin, would you look, please, at AR-53, Attachment A, page 1.

I asked you a little bit about that this morning. Let me inquire a bit more. This sheet purports to show, does it not, the additional amount of revenue which ABC would have realized during the prime evening hours if it had sold its time at the price per minute which is the average of the CBS and NBC price, is that correct?

A. Actually, if we had the average of the homes that CBS and NBC had, we would be able to sell it at that price at that [3506] cost efficiency level.

Q. I am not sure I understand that answer. You have computed the CBS and NBC advantage of \$3,400 a minute by averaging the average cost per minute of CBS, which is \$38,300, and NBC which is \$40,300, and getting \$39,300, is that not right?

A. That is correct.

Q. The difference between that and ABC's average price per minute is \$3,400?

A. That's right.

Q. Now I asked you this morning whether on the basis of the reasoning employed in this exhibit you could not also compute the additional amount which CBS would have recovered if it had charged NBC's average cost per minute and you said you could do so. Is that correct?

A. That's right. I don't have the number of minutes they sold, however.

Q. Is it fair to assume that CBS has sold at least as many minutes as ABC?

A. That's right.

Q. So that is 7,629 minutes as shown on this page, is that correct?

A. That's correct.

Q. Would you accept, subject to check, Mr. Sonkin, that 7,629 times 2,000 would be \$15,258,000?

A. That's right, gross.

[3507] Q. Is it your opinion that this \$15,258,000 figure represents in any sense a disparity to the Columbia Broadcasting System, a revenue disparity, under which CBS suffers?

A. If you will note from the cost efficiency table, that CBS's programming was sold at a lower efficiency rate than NBC's. If they had sold at a higher efficiency rate they probably would have been able to sell it—if the efficiency was higher, the cost efficiency was higher, they would have had a higher dollar figure.

Q. By cost efficiency, you mean cost per thousand?

A. Cost per thousand, that's right.

Q. Is it not a fact that cost per thousand is an after-the-fact computation?

A. That's correct.

Q. Do you have occasion to assist ABC sales department when it comes time to setting a price which you are going to ask for, say, a commercial minute on a new program for next season?

A. No, I don't.

Q. You do know, do you not, that the network sets an asking price based upon its own estimation of the attractiveness of the particular program and that the cost per thousand is then a kind of after-the-fact confirmation of either the correctness or the incorrectness of that assessment, is that correct?

A. That's correct.

Q. So that it is entirely possible, is it not, for [3508] networks to manifest rather disparate costs per thousand over a substantial period of time?

A. That's right.

Q. And that, indeed, is demonstrated on this page, is it not, where NBC has had a cost per thousand of \$4.25 and CBS of \$4.10?

A. That's correct.

Q. It is also demonstrated on Attachment A, page 2, is it not, where CBS has a cost per thousand of \$1.54 daytime and NBC had a cost per thousand of \$1.85 daytime?

A. That's right.

[3532]

By Mr. FITZPATRICK:

Q. Yes, but I am just talking about this exhibit. This exhibit shows that based upon ABC losing so much money during this time period in relation to CBS and NBC averaged out, from this exhibit should we not also conclude based upon what you show here that CBS is losing money based on ABC during this time period?

A. Based on these figures if you calculate it in the [3533] prime time area it would appear that way.

Q. Is that a fact? Is that what is happening in the industry?

A. I don't know what CBS and NBC are making. I just know what the combined dollars are, the FCC figures.

Q. How did you arrive at the Nielsen yearly average? Did you take the monthly ones or what?

A. This is Monday through Sunday, 7:30 to 11 p.m. over the 52 week period, January-December 1966, the average minute audience.

Q. Were there times during this period that ABC did not have less homes than CBS and NBC?

A. Not in terms of an average week but there might have been a program or two when we were more competitive.

Every network has some popular shows and some weaker shows.

Q. This exhibit here was not based on the concept of the participation minute, was it?

A. No.

Q. Based upon the participation minute there are certain programs during prime time hours where ABC charges more than does either NBC or CBS during the same time period, is that correct?

A. There are a few, yes.

[3605]

# TESTIMONY OF WILBUR L. ROSS

By Mr. BERGSON:

Q. Now, Mr. Ross, have you prepared a plan of your own

that you would suggest to ABC, assuming the accuracies of all the variables in AR-3?

A. Yes, sir, I have.

Q. I show you a document which I have marked AR-71 for identification and ask you if this document is that plan?

A. Yes, sir, it is.

Mr. BERGSON. I offer AR-71.

CHIEF HEARING EXAMINER. Do the parties have copies, Mr. Bergson?

Mr. BERGSON. Yes, your Honor.

I hand the Reporter one copy and I will give him another copy in a moment.

CHIEF HEARING EXAMINER. Very well, sir.

Is there any objection? It will be admitted into the record. [3606] (The document referred to was marked for identification and received in evidence as Exhibit AR-71.)

By Mr. BERGSON:

Q. Mr. Ross, will you please explain what your plan is?

A. Yes, sir.

The plan has two basic components to it. The first one involves the public offering in October 1967 of \$64 million principal amount of 4½ percent subordinated debentures due December 31, 1987 and assuming a price on the stock in the high 60's I would use \$70 or a little better as the conversion price.

The sinking fund would not begin until after 1970.

Second, by the end of 1967, secure commitment from the Metropolitan, possibly another insurance company, for \$39,500,000 principal amount of 5.55 percent senior notes due—

CHIEF HEARING EXAMINER. Excuse me, sir, the witness is reading from page 1 of AR-71, Mr. Bergson.

Mr. FITZPATRICK. That is in the record.

CHIEF HEARING EXAMINER. I don't think you want that I am sure.

By Mr. BERGSON:

Q. Now, Mr. Ross, I postulated my question on the assumption and my request to you for the preparation of this [3607] plan on the assumption that the projections in AR-3 were correct. Is that right?

A. Yes, sir.

Q. Now in your judgment is the plan that you have prepared bankable on the basis of the facts that exist as of 1967?

Mr. GROSSMAN. May I have the question read, please.

CHIEF HEARING EXAMINER. Read it please.

(The question was read by the Reporter.)

Mr. GROSSMAN. I am rather unclear as to what Mr. Bergson means as to the facts existing in 1967. Are you asking the witness, Mr. Bergson, to speculate on the feasibility of this plan on an assumption other than the assumptions of AR-3?

Mr. BERGSON. I am asking the witness to testify as to what would happen if he took in his judgment as an investment bankers, he took this plan today to borrowers and to the capital market.

CHIEF HEARING EXAMINER. I think the question is clear. I will overrule any objection.

The WITNESS. To make the plan bankable what would be required would be to convince the lenders and the others who would be participating in the underwriting group of the convertibles——

CHIEF HEARING EXAMINER. Is the answer no to the question?

The WITNESS. The answer, sir, is a qualified yes.

[3608] The "yes" being if I can convince the people that the 15 percent growth will occur, yes, it is bankable.

\* \* \* \* \*

[3610] \* \* \* \* \*

Q. In your judgment as an investment banker, if you presented this plan to lenders what would be the nature of the restrictive covenants that the lenders would require?

A. The restrictive covenants would relate to——

Mr. GORDON. It seemed to me we made an objection to that type of question before.

CHIEF HEARING EXAMINER. Yes, sir.

I am going to let him proceed over objection and exception subject to a motion to strike when he completes his testimony, as in the case of Dr. Burton.

The WITNESS. Would you repeat the question, please.

(The record was read by the Reporter.)

The WITNESS. The covenants would relate to working capital, to the dividend payments, to additional borrowings, probably to the incurrences of additional long term leases beyond a certain magnitude.

Those would be principal restrictive covenants that would be involved. There would be others as exist in the current [3611] Metropolitan loan relating to what you can and cannot do with various subsidiaries in the way of disposal of them or of their principal assets.

[3625]

#### TESTIMONY OF JOHN CAMPBELL BURTON (Recalled)

By Mr. FITZPATRICK:

Q. If you were asked for your recommendation as to whether or not this plan as depicted in AR-71 should be utilized by ABC for financing their future plans and was depicted in AR-3, what advice would you give?

A. I believe in the first place this appears to be a viable plan. The question as to whether it is the plan that should be used would depend upon, as I think I indicated in my testimony the other day, the extent to which a management wishes to incur risks of various sorts in order to avoid dilution of the equity. I believe of the plans which I developed the one plan which requires the issuance of a convertible debenture or the plan which represents some combination of debt and equity would be the plans that I would look most favorably on.

[3626] Q. Are you referring to your plan 3?

A. I am referring to my plans 3 and 4, 3 being the plan that uses convertible debt in a somewhat smaller amount and 4 being a plan that uses a combination of debt and common equity financing. Now, as to whether I would advise the management that AR-71 was the plan which I would counsel, would require more study on my part that I have been able to give it.

Q. Let me ask you, with respect to the five plans which you proposed in J-350, if you were asked which one you would recommend as being the most, I believe you used the term viable, or feasible, which one would you recommend?

A. This, again, depends upon the risk preferences involved. My feeling is that the plan—well, let me say that plan 5, it seems to me, represents too great a dilution in the equity to be acceptable to the shareholders.

CHIEF HEARING EXAMINER. I think we can shorten this up, sir. Which is the most viable of all? There are five plans.

The WITNESS. Which would I prefer? I think plan 4 would be the plan that I would probably select.

[3695]

Testimony of Sidney Walter Dean, Jr., by Mr.  
FITZPATRICK:

Q. Now, your second point was the effect of the merger on advertisers and advertising volume. Do you have some pertinent and relevant testimony to give in that regard?

A. Yes, sir.

I foresee two effects of such a merger on the advertising of the ABC-owned and operating stations and the ABC network. One effect will be the beneficial effect of reciprocity from reciprocal advertising from businesses with whom ITT has its relationships. I believe this effect would be immediate. I believe it would be specific and I believe it would be very small in the aggregate because reciprocal dealings breed reciprocal dealings and counterreciprocal dealings and they are not a very important factor in the procurement of [3696] advertising by stations and networks.

The effect I foresee with the greatest impact on the future advertising of ABC-owned and operated stations and the ABC network is the avoidance of the use of ABC-owned and operated stations and the network by those industrial corporations who are wholly or partially in competition with the products or services or divisions of ITT in the United States and abroad.

This is a positive and an important fact of life.

[3869]

#### TESTIMONY OF RALPH VAN HORN

Ralph Van Horn was called as a witness and, after being first duly sworn, was examined and testified as follows:

## DIRECT EXAMINATION

By Mr. COHN:

Q. Would you please give the Examiner your full name and address?

A. Ralph Van Horn, 70 Charles Street, New York 14.

Q. By whom are you employed?

A. ITT.

Q. And by whom were you employed in the year 1962 and 1963?

[3870] A. ITT.

Q. Did you ever work for one Mr. Graham at ITT?

A. I did.

Q. Did you work for him during the period 1962 and 1963?

A. I did.

Q. What position did you have with Mr. Graham?

A. I was assistant to Mr. Graham.

Q. What is Mr. Graham's first name, by the way?

A. Jack.

Q. Did you ever prepare a written study on UHF for submission to Mr. Graham?

A. No.

Q. Did you ever make any report of any kind to Mr. Graham on UHF?

A. Yes.

Q. What was the form of that report?

A. It was an oral report for discussion with Mr. Graham.

Q. That was held in Mr. Graham's office?

A. Yes, sir.

Q. Did you have any notes or memoranda in front of you at the time you made your report to Mr. Graham?

A. Yes, I did.

Q. Did you submit those notes or memoranda to Mr. Graham?

[3871] A. No. They were purely for the purpose of the discussion with him.

Q. Did you make any recommendation to Mr. Graham based upon these memoranda that you had in front of you?



Mr. GORDON. I object. This is going beyond what he said his testimony would be limited to.

CHIEF HEARING EXAMINER. That is my understanding.

Mr. COHN. I withdraw the question.

CHIEF HEARING EXAMINER. Very well, sir.

By Mr. COHN:

Q. Have you made any effort, Mr. Van Horn, to find those memoranda that you referred to or that memorandum you referred to during the past few days?

A. Yes, sir, last week.

Q. Will you please tell the Examiner what you did in attempting to locate that particular memorandum?

A. Pursuant to a request from our legal department, I made a causative search of my files, double checked by my secretary, so that the two of us made a complete search of our files, and found no such written report.

Mr. COHN. Mr. Examiner, that is all I have of Mr. Van Horn.

CHIEF HEARING EXAMINER. You may cross-examine.

[3872]

CROSS-EXAMINATION

By Mr. GORDON:

Q. You state that you were an assistant to Mr. Graham in 1962 and 1963?

A. That is correct.

Q. What were your duties at the time?

A. I was his marketing executive on his staff.

Q. Did he ask you to make a study of UHF possibilities in the United States in 1963?

A. He asked me to become familiar with the field and to develop notes for discussion with him.

Q. Would you be more familiar with the field of UHF in what fashion?

A. Specifically bearing on the question of whether ITT should make application for any UHF licenses.

Q. You mean construction permits?

A. Yes.

Q. When was this request made of you by Mr. Graham?

A. In the early part of December, 1962.

Q. Did you diligently try to fulfill his request of you?

A. Diligently within the time frame permitted. The request was to make not an exhaustive study but a quick screening of what was taking place in the field of UHF and to develop information that we could then discuss as to what our [3873] posture might be.

Q. When did you make the oral report you state you made to Mr. Graham?

A. Around the middle of December.

Q. So, it took you about two weeks to make the study that he had requested of you?

A. Considerably less than that. The length of the study was based also on other commitments that I had as an assistant to Mr. Graham.

Q. If he asked you in early December to make the study for him and you state that you reported to him orally in mid-December it could not be far less than two weeks?

A. My recollection of the exact date of the request is hazy. I do recall more precisely when the discussion took place.

Q. When was that date?

A. That was within a day or two of December 12.

Q. How do you happen to remember that date?

A. Because on December 12 I obtained some essential information to this and shortly thereafter had my discussion with Mr. Graham.

Q. How do you know you obtained essential information on December 12, 1963?

A. Because I checked with my travel voucher which indicated the date that I made this particular call.

[3874] Q. You traveled outside of New York City to obtain this information?

A. Yes.

Q. Where did you travel to?

A. Camden, New Jersey.

Q. Whom did you interview at Camden, New Jersey?

A. Mr. C. H. Colledge, RCA's head of their broadcast transmitter division.

Q. How long did you spend with Mr. Graham discussing

your report?

A. I don't recall precisely.

Q. What other source material did you use in making up your report?

A. TV Factbook, trade press, articles that we were able to quickly—basically published data that we were able to accumulate from a variety of sources including the electronics industry association.

Q. How extensive were your notes that you prepared for your discussion with Mr. Graham?

A. Including working papers, no more than a few pages.

Q. No more than how much?

A. No more than a few pages.

Q. What do you mean by "a few"?

A. Three or four pages. These included notes I would have made, for example, in talking with Mr. Colledge.

[3875] Q. You now recollect that back about December 13 or 14, 1963 you had notes of three or four pages that you used to discuss your report with Mr. Graham?

Mr. WHIPPLE. Mr. Gordon, I think he testified 1962, just to keep the record straight.

By Mr. GORDON:

Q. 1962, I am sorry.

A. 1962.

Q. You now recollect that is the extent of the notes you had, three or four pages?

A. That is the best of my recollection.

Q. During the course of your discussion could Mr. Graham observe that you were referring to notes?

A. Oh, yes.

Q. There was no secret?

A. No.

Q. You had the notes out in front of you when you were discussing this?

A. Certainly.

Mr. GORDON. No further questions.

CHIEF HEARING EXAMINER. Mr. Fitzpatrick?

By Mr. FITZPATRICK:

Q. Did you destroy these notes yourself later?

A. My recollection at that time is that they were placed in my out basket for filing by my secretary.

[3876] Q. So they would have or should have been filed in the usual course of business; is that right?

A. That is correct.

Q. But a diligent search now fails to disclose them; is that correct?

A. That is right.

Q. Now, you did not write any report to Mr. Graham. Did you contemporaneously write any report on UHF?

A. No.

Mr. FITZPATRICK. I have no other questions.

Mr. COHN. Mr. Examiner, I have a couple of questions if I may.

CHIEF HEARING EXAMINER. Proceed.

#### REDIRECT EXAMINATION

By Mr. COHN:

Q. Have your offices been moved since 1962?

A. They were moved in very late 1964.

Q. Where were they moved from and to?

A. 320 Park Avenue to 477 Madison.

Q. All of your files went at the same time?

A. No, we have less file space in our new quarters and consequently the files were examined and the material was removed.

Mr. GORDON. I am sorry. Would you read the last part of that answer?

[3877] Mr. COHN. The files were examined and the material was removed.

By Mr. COHN:

Q. When you say material you mean sorted out the files and discarded material no longer needed?

A. That is right.

Q. During this period of early December to mid-December, did you do anything else for Mr. Graham outside of this project concerning UHF?

A. You mean related to UHF?

Q. No, anything besides UHF?

A. Oh, yes.

Q. What do you mean by "Oh, yes"?

A. UHF was a very peripheral study. My full time—

Mr. GORDON. I object to his characterization.

Mr. COHN. Mr. Examiner, Mr. Gordon asked him how much time he spent during this period of time in pursuing it. Now the witness is explaining.

CHIEF HEARING EXAMINER. I don't think it is important one way or another. I sustain the objection as irrelevant.

By Mr. COHN:

Q. Can you tell me what percentage of the time you spent on UHF matters during this period from early December to mid-December?

A. Less than 10 percent.

[3878] Q. Mr. Gordon asked you a question about how long this conversation lasted between you and Mr. Graham on this UHF with three or four pages in front of you. You stated you did not recall. Can you give me your best estimate? Was it a full day, half day, an hour, ten minutes or what?

A. To the best of my recollection it was no more than—it was part of roughly a two-hour session with Mr. Graham and not the entire time was devoted to UHF. As an assistant to Mr. Graham I met with him periodically to discuss all things that we were doing in carrying out his responsibilities. UHF was one of the things discussed at that meeting.

Mr. COHN. Thank you very much, Mr. Van Horn.

CHIEF HEARING EXAMINER. If there is nothing further, the witness is excused.

(Witness excused.)

Mr. COHN. May we go off the record for a moment?

CHIEF HEARING EXAMINER. Very well, sir.

(Discussion off the record.)

CHIEF HEARING EXAMINER. On the record.

Mr. COHN. May I state for the record Mr. Fitzpatrick has been kind enough to remind me that apparently I did not ask the witness' present position. May I ask him that question at this time?

CHIEF HEARING EXAMINER. Very well, sir.

[3879] Whereupon, Ralph Van Horn was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

#### REDIRECT EXAMINATION

By Mr. COHN:

Q. What is your present position?

A. Director of marketing on the North American Headquarters Staff.

Q. Of ITT?

A. Yes.

CHIEF HEARING EXAMINER. Very well, sir.

Thank you.

[3947] \* \* \* \* \*

#### ORAL ARGUMENT OF MR. KESTENBAUM

Commissioner LOEVINGER. What is the relevant market in this case?

Mr. KESTENBAUM. Well, the principal relevant market, sir, is the business of network broadcasting.

Commissioner LOEVINGER. All network broadcasting or television network broadcasting?

Mr. KESTENBAUM. The principal market with which we have been concerned and with which this proceeding has been concerned is the television network business.

\* \* \* \* \*

[3990] Commissioner LOEVINGER. Yes, this was 1949. But by that time television had been developed very close to its present state by the way in technology. Since then it has been largely economic.

It reads as follows:

Foreword by Karl T. Compton:

In the development of industry today, one of the major problems is a smooth and rapid transition from advances in science to their application in technology.

The distinction the author draws between the scientist, the inventor, and the business innovator is of major significance to an understanding of the process of technological change. Probably the most inchoate of the three activities is the function of business innovation.

#### Preface:

Finally, the difference between invention and innovation requires emphasis. When an invention is introduced commercially as a new or improved product or process, it becomes innovation. Usually the innovator is an entrepreneur, not an inventor. And innovations cover a much wider sphere of possible new developments than inventions. The conception of a new use for an old product, such as entertainment broadcasting, or an organizational innovation like the formation of the Radio Corporation of America, is frequently a more important turning point in the evolution of an industry than the commercialization of a new invention.

I believe, therefore, that if the radio [3991] industry had been composed exclusively of such small companies as Philco, Zenith, Sylvania, Galvin or Emerson, the emphasis would have been on the engineering improvement of existing products rather than on longer-range explorations into new areas. The most important research in radio was undertaken by the large corporations. It may be that we are dealing with an industry in which the large companies were exceptionally forward-looking in this respect. Certainly the original decision of the General Electric executives to establish a centralized research laboratory was a very progressive step.

The Bell Telephone Laboratories is also a unique institution. Since before the first World War, the American Telephone and Telegraph Company has had a virtual monopoly of the telephone business in the United States. As monopolists, the officers of the company might have been indifferent to new developments outside their immediate field of wire telephony. Instead they built up a

great industrial research laboratory with far-ranging interests over the whole area of electrical communications.

At page 254:

The Westinghouse research laboratories did pioneering work on the a-c tube, which made it possible to plug a radio into a light-socket in the home. They also supported Zworykin in his early work on the photo-electric cell, the iconoscope and other vital aspects of electronic television. And when radio manufacturing was transferred from Westinghouse [3992] and GE to RCA in 1930, Dr. Zworykin's work was absorbed and expanded greatly. Since then the Radio Corporation has carried the main burden of research in television, involving, as we have seen, very substantial expenditures. Compared with these four companies, the research undertaken by the rest of the industry was far less significant.

At page 255:

I believe that, if the Bell Laboratories had been provided with a more direct incentive, the power of their research organization, and their very great skills, would have resulted in more important contributions to television. Considering next the General Electric Company after its separation from RCA, the patent cross-licensing policy did not provide the maximum incentive for GE to press forward with original radio research. This perhaps explains why General Electric made no significant contributions to television or FM up to World War II.

It was Mr. Sarnoff of RCA who saw clearly the commercial possibilities of television and made arrangements with the Westinghouse laboratories to have Zworykin's work pushed forward more rapidly.

[3993] Commissioner LOEVINGER. The substance of this study is, and this is supported by my own research in which I have undertaken to study in detail the history of technological development of communications from prior to maximum, well down to the date of writing, which was early 1966, the tele-



vision in the U.S. has been developed by four companies, AT&T, General Electric, Westinghouse, and RCA.

The first television broadcast as I recollect was by AT&T. The second one was by RCA. AT&T for a variety of reasons has withdrawn from the field. RCA is and has been the major technical innovator in this field.

[4055]

Commissioner LEE. You wouldn't agree then that they were in a secondary competitive position when there are only two affiliates, neither of which is a primary affiliate of ABC?

Mr. KESTENBAUM. There is somewhat of a disadvantage, and I think what Dr. Golden said was that there is a greater statistical probability of getting clearances, obviously, if you are a primary affiliate. That is what primary affiliation demonstrates.

But the size of the obstacle is what we had to explore. So far as the record indicates, the obstacle is not one that has been really of that great a difficulty.

Let me put it this way. It is not of that great significance at the present time. [4056]

Commissioner LEE. Does the record indicate anything with respect to the fact that ABC does or does not pay premium rates to stations for affiliation in markets where they are limited facilities?

Mr. KESTENBAUM. Dr. Golden said that one of the ways ABC competes in those markets for getting a primary affiliation and for getting clearance is sometimes by offering a higher station compensation. He also pointed out that CBS did the same thing in the early 1950s when it was trying to break in and improve its position in many of the markets, the television markets of the country, and that that practice has since vanished from CBS. He believes it to be a temporary phenomenon.

Commissioner LEE. There is an important distinction there. When CBS was trying there were facilities either available or coming into the market soon. That brings me to my next point.

[4069]

## ORAL ARGUMENT OF MR. FITZPATRICK

ABC, as a user and as one of the three networks being an extensive user in the present and a more extensive potential user, has taken positions in the past with respect to common carrier matters which were opposite to those taken by ITT World Company, a common carrier and a wholly-owned subsidiary of ITT Corporation.

Instances of these opposite views and positions are, one, the authorized user proceeding, which was Docket 16058 where ABC, together with CBS, urged that they, the networks, should be permitted to obtain service directly from Comsat, whereas ITT World Company and RCA Communications urged that Comsat satellite be accessible only to authorized communications common carriers. NBC filed no comments in that proceeding.

Another example would be ABC and ITT World Company taking opposite positions in a proceeding relating to the lease of television channels in the Early Bird Satellite proceeding.

And another instance would be where ABC, together with CBS and NBC, questioned the reasonableness of the tariff filed by ITT World Company for the Gemini splashdowns, and objected to the joint tariffs filed by ITT and other international common carriers for space flights.

[4070] While both ABC and ITT in the docketed proceeding 16495, relative to the domestic use of satellites, urged that the Commission had jurisdiction under the Communications Act to permit the operation of domestic satellite facilities, they differed on the advisability of permitting such operation to be by private systems rather than the common carriers. Needless to say, it was the ITT subsidiary which felt it should be by common carrier.

Both ABC and ITT agreed during this proceeding and in the pleadings that they filed at the close of the proceeding that networking by satellite lies in the immediate future and that global coverage commenced with the Early Bird, and is likely to expand in giant strides.

I am using the terminology of ABC and ITT.

ITT has represented to the Commission that ABC as a substantially autonomous body will be free to state its position as a user before this Commission and other regulatory agencies. ITT further represents that its method of operation of ABC as a substantially autonomous subsidiary is harmonious with the present ITT management system. However, the hearing record, developed during some thirteen days of hearing, discloses that a number of ITT subsidiaries are treated as divisions of the parent corporation, and that the family concept which pervades the entire ITT organization is frequently felt and recognized by all within the family group.

[4071] In this light a question is raised as to whether ABC will be operated as a substantially autonomous subsidiary or whether it will in fact be treated as are the present subsidiaries. In this regard it is significant to note that a great deal of the reliance of both ABC and ITT on the autonomous aspects of ABC rests upon what they urge will be an independent outside board of directors.

I must respectfully differ with both ABC and ITT on this point, and I must respectfully submit that ABC will not have an independent board of directors after the merger. I think that this requires some explanation on my part.

ABC's present board of directors is composed of some fourteen individuals. Five of these individuals, Messrs. Goldenson, Siegel, Moore, Clark and Ehrlich, are key ABC employees. The remaining nine are outside directors. In the event of the merger the board of directors will be increased from fourteen to sixteen with Mr. Geneen and Mr. Perry being added to the board of directors of ABC. This will result then in the five key members and Messrs. Geneen and Perry, or a total of seven of the sixteen being in-house individuals. However, another factor enters the picture, and that is that two of the independent directors who now constitute the independent directors are to be placed on the ITT board since the ITT board is to be expanded by some four members and Messrs. Siegel and Goldenson and these two independent directors are to be on [4072] the ITT board. When these two independent directors go to the ITT board they will no longer be independent outside directors since they

will owe their loyalty to ITT as well as to ABC. That would thereby give us nine directors of a total of sixteen who cannot be characterized in my opinion as independent outside directors.

[4076]

Contrary to the representations made to the Commission at the first hearing in September of 1966 that ABC's only source of funds was a merger with ITT, the further hearing established that alternative sources of funds are available to ABC in the open market to finance its needs. Therefore, if this Commission's decision in granting the application rested principally upon the representation that ITT was the only source of meeting ABC's financial need, the further hearing record in this proceeding supports the conclusion that ABC can obtain the needed funds on the open market, and your decision should be revised accordingly.

[4079]

The record establishes that availability of additional cash resources to ABC resulting from the proposed merger would have little effect in increasing ABC's share of network revenues. Mr. Goldenson, president of ABC, testified that ABC was not handicapped in entertainment program efforts by any lack of funds, and that it therefore is concluded that ABC's revenue problems will most likely yield only to programming ingenuity or, as already referred to, the positive equalization of UHF coverage with that of VHF in the two-station markets, something which I believe I can say the Commission hopes to see happen within the next five years.

Considerable evidence was adduced relative to ABC's less favorable revenue and profit position vis-a-vis the other two networks, that ABC is in a less favorable position in both the [4080] area of profits and revenue is undisputed. However, it should be noted that ABC's increase in television network revenue from 1964 to 1966 represented a 37.9 percent increase whereas the average increase of its two competitors during the same period was some 23.1 percent.

## ORAL ARGUMENT OF MR. J. MCKENNA

[4130]

The record, both of the September hearing and of the reopened hearing, shows that it is a mistake, therefore, to emphasize, to over-emphasize, the benefits of the financial resources which ITT will bring to ABC to the exclusion of the other public interest benefits which will flow from the merger.

The Commission's decision in December granting the merger application did not make this mistake. It cited three significant public benefits.

First, that ITT's larger resources will strengthen ABC's capacity to compete effectively with NBC and CBS.

Second, that the merger with the attendant infusion of capital resources would provide tangible benefits in such areas as conversion to color, new program production facilities, and [4131] even enlarged news and public affairs programming.

And, third, that the merger would help UHF broadcasting, both by strengthening our UHF affiliates, now and to be added, and thereby improving UHF's competitive potential, and by ITT's commitment to the advancement of UHF technology.

We have gone into detail in our proposed findings at Pages 64 to 70 to summarize these benefits and to spell them out. Briefly, by way of summarizing, these are the advantages:

That by associating ABC with a company with the substantial and diversified resources of ITT, ABC will be able to engage in the long range development and take the program risks that are beyond the company's resources as now constitute; that the immediate cash availability will enable ABC to convert its full schedule to color, to modernize its plant, and to compete for feature film packages.

These are the areas which will be developed by Mr. Bergson.

That competition among the three networks and their affiliates will be heightened with resultant benefits to the public interest; that as a strong competitor, ABC will be able to attract more affiliates and more clearances, thereby evening up the competition gap; that with the resources and backing of ITT, ABC in many instances will be able to foresake reliances

upon secondary clearances on VHF stations in favor of primary affiliations with UHF stations; that the planned expansion of ABC's news and public affairs programs can be continued, rather than cut back; and also, [4132] as Mr. Whippel will point out in his argument, that ABC's technological needs will be met.

[4137]

Now there are a host of practical considerations at work that make sure that conference of the type that have been expressed are never realized in practice.

For instance, there is intensive rivalry among the news departments of the three networks. Suppression of news or documentaries would hardly be attempted in this atmosphere. There is also the intense personal competition that exists among Huntley-Brinkley versus Walter Cronkite, versus Peter Jennings. All of these persons have nation wide representations for integrity. If their personal integrity were ever compromised their careers would be at an end.

At lower levels there is also the protection of the unions that will come to the aid of any newsman or producer who is fired or demoted or not promoted because he was part of any effort on management's part to suppress news or documentaries.

There is also the very real fact that newsmen frequently move from network to network. Elmer Lower for instance has worked at all three networks. If any one network were ever to suppress there is a practical reality that there was someone in the company who would one day end up working for another network and would make that information known. And there is also the reality that network news people write books about their experiences at the networks.

[4173]

Commissioner Cox. I will return to that later, Mr. Bergson. Now to get on with Mr. McKenna.

You reported something yesterday I wrote in 1963. I take it that there has been some substantial progress in ABC's competitive position since then despite the failure of my colleagues to agree on drop-in's, but do you find any cure—and this is a

question I asked last September—in this proposed merger for the problem of the two-station market?

[4174] Mr. McKENNA. ABC's problem of the two station markets?

Commissioner Cox. Yes.

Mr. McKENNA. Yes, sir, in one of two ways, and it is based on ABC strengthening itself as a network and having a more competitive program service to offer to affiliates. There are some markets, some of these two station markets, where the public interest would be served by having ABC have one of the two VHF affiliates, principally because either NBC or CBS which is in these markets, has other stations reasonably close by which duplicate the service that they provide, to a certain extent.

There are some markets of that kind, where the public interest in getting the greatest amount of program service to the overall public would be best served if ABC were to get one of those VHF affiliates.

In that kind of market, the first objective would be to get the VHF affiliate.

Commissioner Cox. Short of the Commission ordering some readjustment of affiliation arrangements, what is there in the proposed merger that leads you to believe that you will persuade one of those V's to abandon and up to now satisfactory affiliation with one of the other networks?

Mr. McKENNA. Mr. Gaguine describes it in the record as the confidence factor. He did not identify the market, but he referred to a market, a two station market where one of the [4175] stations is now affiliated with CBS but where over here, here and there there are other CBS affiliates that, to a good extent duplicate the CBS coverage that that station is providing.

Commissioner Cox. Aren't there ABC affiliates in those markets?

Mr. McKENNA. No, sir.

Commissioner Cox. In none of them?

Mr. McKENNA. In other words, if this particular station in this particular two station market were to go with ABC, they



would have a much greater unduplicated coverage than they would as an CBS affiliate.

He said that even recognizing that, even recognizing that ABC could afford to pay them a higher rate because of the greater number of homes reached, this particular affiliate who he identified as somebody he knew personally, was still unwilling to do it because he could not be sure that ABC would continue to be able to provide the kind of program service that he wanted, that he knew he could get from CBS, but that if the merger with ITT went through and if ABC were strengthened, and this confidence factor were there, he would be in a position to look at them much more seriously

There are some markets, Commissioner Cox, as I am sure you know, and like that throughout the United States, in these two V markets. As I say, from the overall viewpoint of service to the public, I think that the public would be [4176] better served by ABC trying to get the V in that market and letting CBS which comes in from here, here and here, have the U. Then there are other markets where we know we are not going to get the V, we are just not going to get it.

In those markets we can afford to begin the long range gamble on UHF and begin it now. In these markets at the present time we have to get the secondary coverages on the V in order to reach the overall audience.

We can't afford to give up the short range advantages of this VHF coverage in order to affiliate with the U. We can't afford to do that because we are losing money as a network. We can't afford to do that with our capital resources. But there are markets where, from the long range point of view, we know that sooner or later, assuming UHF is going to work, our interest can be served and adequately.

In these markets we will go with the U's.

Commissioner Cox. Now?

Mr. McKENNA. If the merger was approved, there are a certain number of markets that ABC will go to on the U's, yes, sir, there are.

Commissioner Cox. This means with the merger you would be willing to accept for at least the short term reduced ratings?



Mr. McKenna. In a certain number of these markets, that is correct. That was made clear by Mr. Goldenson in his testimony.

[4177] Commissioner Cox. But your problem, you say, of being equally competitive is that you already are on the short end of ratings, clearances, line ups, audiences, and that your great and overall overwhelming need is to improve that.

[4221]

#### ORAL ARGUMENT OF MR. COHN

Commissioner Cox. Did ITT make an offer to buy WTIC?  
Mr. COHN. No.

Commissioner Cox. Did they draft an offer to purchase for \$35 million?

Mr. COHN. Not an offer to purchase as such, sir. There were papers that were prepared but the Board of Directors and Mr. Geneen did not approve it and, consequently, a formal offer, if I can put it that way, was never made to WTIC.

Commissioner JOHNSON. Didn't Graham testify that Geneen [4222] made such an offer?

Mr. COHN. I don't recall any specific testimony on that, sir.

Commissioner JOHNSON. You do not?

Mr. COHN. No.

Commissioner Cox. The Bureau's findings cites transcript 2598-99 for the proposition that Mr. Geneen made an offer of \$35 million for the station.

Mr. COHN. I don't recall that specific testimony. I will be glad to check the record at lunchtime on that.

Mr. Stark did testify, and this is the Department's witness—

Commissioner JOHNSON. Didn't Geneen also send a cable to Graham in which Geneen said, "Refer to the offer," saying "The offer is indeed generous," a cable of September 7, 1963, Document J-142?

Mr. COHN. There was such a cable. I recall that now.

[4223]

Commissioner Cox. At page 2599 of the record, Mr. Cohn, [4224] line 4, and this is Mr. Graham testifying:

Mr. Geneen and I went to Hartford and met with Mr. Baker and visited the Hartford Television Station, and while we were there Mr. Geneen made an offer for the station.

Q. Do you recall what that offer was?

A. \$35 million with terms to be worked out.

Is that contradicted elsewhere in the record?

Mr. COHN. I don't think that is contradicted, no, sir.

[4252]

Let me now deal with the contacts with Miss Eileen Shanahan of the New York Times. First of all, in order to get this in perspective, it is not a question of character issue in the formal sense of the word that the Commission uses the phrase "character issue," but only the relationship that this kind of [4253] contact has with this issue of the integrity of the news insofar as ABC is concerned.

There were several contacts made by a Washington public relations representative of ITT concerning seeing to it that the New York Times carried its side of the story, that is ITT, complaining about a story being unfair, urging that on another occasion the full text of a Commission be used.

But it is also important to note that never once, as far as this record is concerned, was an effort made or an argument made that a story be changed. Miss Shanahan—and I have no doubt about this in terms of his own feeling about this and her honesty about this, characterized the tone of the voice of the public relations representative as being accusatory and nasty.

She conceded the fact that on the average she received—and I am now quoting—"better than one call a day from people who are involved in" stories that she works on and where they talk to her about the story that she is working on.

She testified that in her conversation with Mr. Mullaney, the Financial Editor of the New York Times, he told her by and large the New York Times relationship with ITT had been

okay and that his experience had been just the opposite of her experience in Washington.

Now, Mr. Kestenbaum in his argument yesterday said we must assume that this kind of activity, this kind of activity here [4254] in Washington by this PR man for ITT, was consistent with the ITT policy. Well, it is not consistent with the ITT policy as demonstrated by the fact that Miss Shanahan herself said that the Financial Editor of the New York Times indicated that this was quite the contrary of what their experience had been with ITT.

Consequently, there is this series of conversations between the Washington PR man for ITT with Miss Shanahan. But certainly it is not a demonstration of the policy of ITT and indeed this very record and Miss Shanahan's own testimony demonstrates that the contrary is true.

Mr. Geneen swore under oath that ABC's news and public affairs programming would remain independent. He testified that he understood the significance of that representation. As Commissioner Loevinger pointed out in his memorandum of November 1, 1966, he makes a point of stating that no officer, employee, or agent of any ITT system, company, or group, shall take any action or make any attempt to influence in any way whatsoever in the news, special events, entertainment, or other programming of the ABC network or stations for the purpose of attempting to further or to avoid a conflict with the Commission or other interests of ITT.

Commissioner JOHNSON. That is a much higher standard, obviously, than the one applied by the employees here in regard to other press media.

[4255] Mr. COHN. Don't say employees, sir. There were two aspects of—

Commissioner JOHNSON. Is Mr. Garrity an employee of ITT?

Mr. COHN. He is not, he is an officer.

Commissioner JOHNSON. Forgive me. Officers or employees.

Mr. COHN. I want to be candid with you, sir.

Commissioner JOHNSON. I appreciate your candor, Mr. Cohn. It does not always come through fully.

Mr. COHN. I try hard. Maybe I will succeed.

Commissioner JOHNSON. With your colleague of Avis.

It seems to me that this represents an entirely different standard with regard to ITT's relationships with ABC and in regard to ITT's relationship with New York Times or the Associated Press or UPI or presumably CBS or NBC.

What I am asking you is whether indeed it is your view that it will be ITT's policy to apply a higher standard to ABC than it applies to other news media?

Commissioner LOEVINGER. Or a different word.

Mr. COHN. I will word it not different. As far as ABC itself is concerned, sir, there is a sensitivity and there is an awareness that Mr. Geneen has spoken and every official of ITT has spoken of that they are fully cognizant of the problem with which the Commission is faced and the possibilities, although remote, that have been presented by the Department.

[4256]

But as far as ABC is concerned, there can be no question as to what the attitude and what the commitments are. The PR people of ITT will not be dealing, because of the nature of the differences of their work, with ABC as such.

The officials who have any kind of responsibility directly to ABC, you have heard from, you have heard their testimony, it is under oath.

You have their commitment.

Commissioner JOHNSON. We have also witnessed their actions, Mr. Cohn.

Mr. COHN. Yes, sir.

Commissioner JOHNSON. And I find them inconsistent with their representation.

Mr. COHN. You find them what, sir?

Commissioner JOHNSON. Inconsistent with their representation.

Mr. COHN. I think they are quite consistent, sir. I think [4257] a full reading of the record proves exactly the contrary of what you have said.

Commissioner JOHNSON. And what you are asking is that we accept that ITT's relations with its own employees or officers within ABC will be a different, a higher relationship than their relationship with the other news media?

Mr. COHN. There is a greater sensitivity and greater awareness plus one other thing: On the ABC side of the testimony of Mr. Goldenson, you have the testimony of Mr. Lower, you have the testimony of the ABC officials themselves as to what their attitude, what their positions are, and consequently it is not dealing with a third person but dealing now with both ends of the stick, not an unknown quantity on one end.

\* \* \* \* \*

Oral argument of Messrs. BERGSON and WHIPPLE:

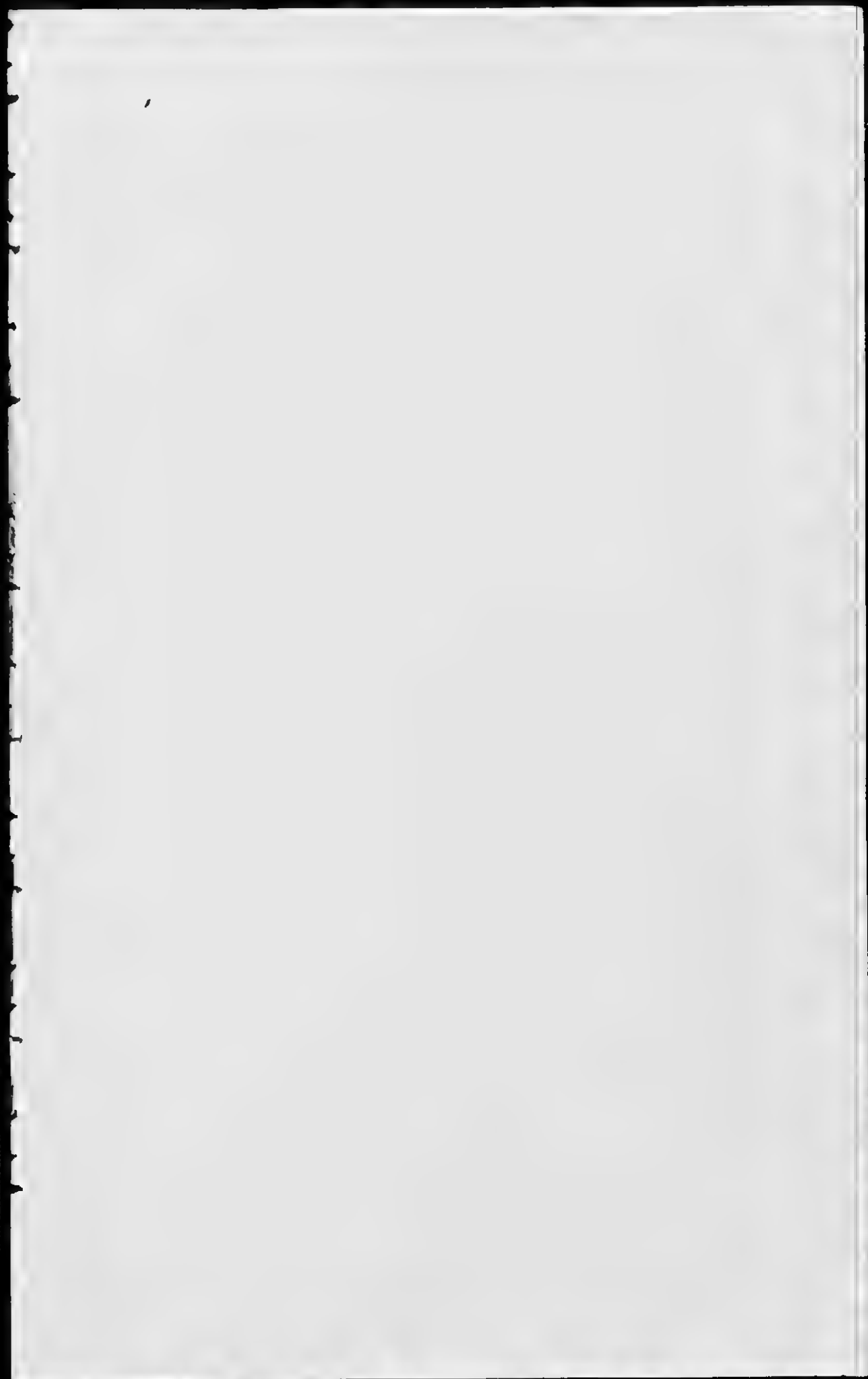
[4280]

Commissioner LOEVINGER. Are you happy to be out of it? Is there any question or any dispute among the parties that the relevant market as defined by the Department of Justice, as being the operation of a national network, is the relevant market for the purposes of this case?

Mr. BERGSON. We have not so disputed it.

Mr. WHIPPLE. Neither have we.

\* \* \* \* \*



**BRIEF FOR APPELLANT**

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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21147

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UNITED STATES OF AMERICA, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE  
INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORA-  
TION AND AMERICAN BROADCASTING COMPANIES, INC.,  
INTERVENORS

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On Appeal from the Federal Communications Commission

---

DONALD F. TURNER,  
United States Court of Appeals Assistant Attorney General,  
for the District of Columbia Circuit

**FILED** SEP 22 1967

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## STATEMENT OF QUESTIONS PRESENTED

1. Whether the Commission's conclusion that ABC's access to the financial resources of ITT would constitute a substantial public benefit is supported by essential findings or evidence of ABC's need for such resources.
2. Whether the Commission's conclusion of substantial benefits to UHF broadcasting is supported by essential findings or by the conditions imposed in the order below.
3. Whether the Commission erred in concluding that the merger would not have significant anticompetitive effects upon ITT's potential activities in (a) broadcasting, (b) CATV and related fields, and (c) advanced aspects of communications technology.
4. Whether the Commission erred in concluding that the autonomy and independence of ABC would be unaffected by the merger and that there would be no adverse impact upon (a) regulatory proceedings, (b) the advertising market, (c) ABC's news and public affairs activities.
5. Whether the Commission erred in failing to give weight to the lack of candor of applicants' principal officers in this proceeding.



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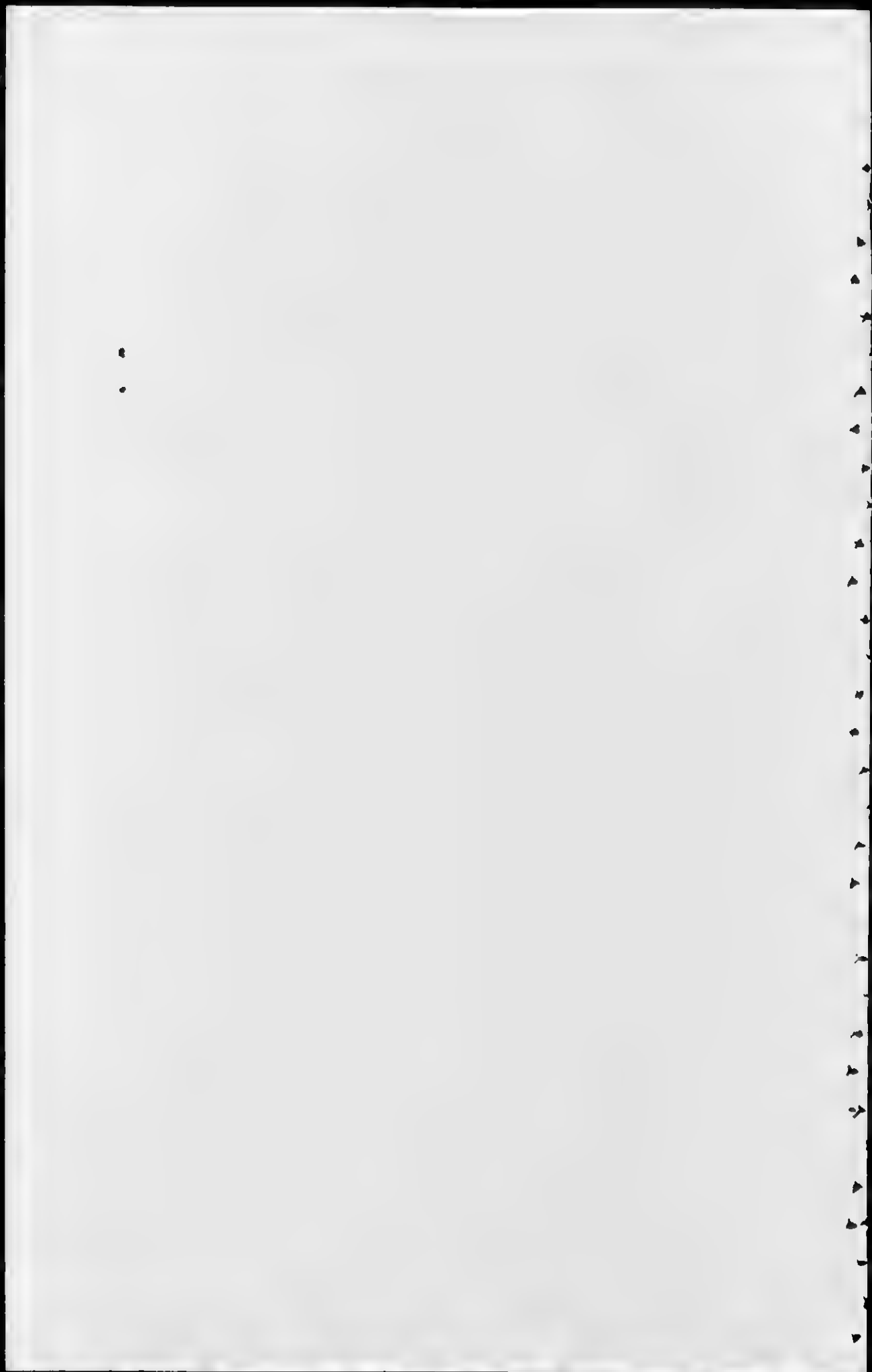
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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21147

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UNITED STATES OF AMERICA, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE  
INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION  
AND AMERICAN BROADCASTING COMPANIES, INC.,  
INTERVENORS

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On Appeal from the Federal Communications Commission

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**BRIEF FOR APPELLANT**

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**JURISDICTION**

On June 22, 1967, the Federal Communications Commission issued an opinion and order (amended June 27, 1967) affirming a prior Commission order of December 21, 1966, approving applications for the assignment and transfer of 17 broadcast licenses from the American Broadcasting Companies, Inc. (ABC) to the International Telephone and Telegraph Corporation (ITT), pursuant to a merger agreement between the two companies (R. 5290-

5471<sup>1</sup>). Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), authorizes an appeal to this Court by any person who is aggrieved or whose interests are adversely affected by an order of the Commission granting an application for transfer. The United States of America, which was a party to the Commission proceeding, and which is a party with standing to appeal under Section 402(b), filed a timely notice of appeal in this Court on July 21, 1967. Upon filing of the notice, this Court obtained jurisdiction of the proceedings pursuant to Section 402(c) of the Communications Act of 1934, as amended, 47 U.S.C. 402(c).

## STATEMENT OF FACTS

### 1. *The Merging Companies*

American Broadcasting Companies, Inc. (ABC), operates one of the three national television networks and one of the four national radio networks in the United States. It owns five VHF television stations, six AM and six FM stations, all in the top ten broadcasting markets, the largest theater chain in the nation (401 theaters), a major record business, a music publishing business, farm newspapers, wholly-owned subsidiaries which distribute television programs domestically and abroad, and has interests in several electronic firms (R-1, Ex. I-4, Notice of Meeting, pp. 24-27; J270, R. 3531, *et seq.*). In 1966,

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<sup>1</sup> In this brief, the record is cited in conformity with the Commission's Index of Record filed with this court. The stenographic transcript of the hearings is cited "Tr."; the pleadings, orders and other papers filed up to April 21, 1967 (including the Commission's first opinion) will be cited R-1 to R-105, designating each document as a unit; the parties' exhibits, and the subsequent pleadings and orders (including the Commission's second opinion) are cited R. 106 *et seq.*, designating each page of the documents separately. (The earlier "R" citations are hyphenated to distinguish them from the latter pagination).

The exhibits are cited "J" for exhibits filed by the Department, "BB" for exhibits of the Broadcast Bureau, "AR" for exhibits filed by the applicants in the supplementary proceeding, in each case followed by an "R." page reference.

ABC had total revenues of \$540 million, of which \$413.7 million was derived from broadcasting operations, and net operating profits after taxes were \$17.9 million, which were record levels for the company (J270, p. 2, R. 3532; J271, R. 3552; J272, R. 3553; BB1, R. 4319). ABC's operations have been profitable every year since 1953, and its share of television network revenues has risen from about 9% in 1953 to about 27% in 1966 (BB1, R. 4319; see *Television Factbook*, 1966 ed. p. 58-a). Revenue growth from 1964 to 1966, in fact, exceeded the average CBS-NBC growth (38% for ABC as compared with 23% for its competitors). Annual reports for recent years reiterate the attainment of "record levels" and "historic highs" in describing ABC's financial experience (J270, p. 2, R. 3532; R-1, Ex. I-4, 1965 Annual Report, p. 2; J269, p. 3, R. 3506; J268, pp. 2-3, R. 3475-6; J267, pp. 3, 8, R. 3445, 3449; J266, pp. 3, 8, R. 3411, 3416; J265, pp. 2-3, 5, 7, R. 3379-80, 3382, 3384).<sup>2</sup>

ABC's television network, at the end of 1966, had primary affiliation contracts with about 138 television stations, covering about 93% of the national television audience (Tr. 3317, 3541). Since affiliates cannot be required to take a network's programming, the effective measure of competitive position is success in obtaining clearances (R. 3037-8, 3040-1). ABC's typical nighttime program is carried by more than 170 stations covering 96-97% of the national television audience (Tr. 3381; e.g., J269, p. 9, R. 3511). Since the 1964-5 season, ABC has been virtually tied in prime-time audience with the other two national television networks (J6, R. 1594; J269, pp. 3, 7, R. 3506, 3510; Tr. 3040-1, 3045-7, 2352-4). At the present time, ABC obtains about 31% of combined prime-time revenues (see J273, R. 3554; AR76, R. 1457).

<sup>2</sup> The above-cited annual reports also show that ABC dividend payments have increased substantially in recent years, and that it has raised \$97.5 million by borrowing, without difficulty. The financial institutions made the loans on the basis of general reviews of the company, without finding it necessary to determine the maximum they would lend ABC (Tr. 1324, 1328, 1365).

Its overall market share (now about 27% as noted above) is expected to increase as it develops further experience in other segments of the broadcast day, in late-night and daytime, areas in which it has only recently begun to concentrate (Tr. 2352-4, 3046-7). The president of ABC's television network testified that although not their absolute equal, ABC is today a "full competitor" of the other networks (Tr. 3314-5). ABC's impressive performance and prospects for further growth in the future have caused it to be highly regarded by respected financial analysts, (J193-J204, R. 2559-2794; Tr. 3029-32).<sup>3</sup>

ABC has enjoyed a reputation as an innovator in television network programming (Tr. 3314-5). In becoming competitive in prime time, it initiated "counterprogramming," devising new formats and concepts to present against the shows of the other networks, and utilized motion-picture company studios (Tr. 2469, 3314-6).<sup>4</sup> ABC has also been successful in acquiring rights to show some of television's most popular attractions;<sup>5</sup> and independent producers are extremely anxious to have their programs shown on the ABC network (Tr. 2326). Indicative of its enterprising role was ABC's initiative in advancing the

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<sup>3</sup> In the year of the merger, 1965, ABC claimed publicly that it was "indisputably the Network on the Move" (J225, R. 2943). ITT decided upon the merger, in December 1965, on the basis that ABC was in sound financial condition and showed better ratios of revenue/assets and earnings/assets than did ITT; that ABC's earnings were expected to grow at a higher rate than ITT's and its growth rate would exceed that of NBC and CBS; and that ABC would generate substantial cash for reinvestment outside the television business (J238, pp. 2-3 and "Financials", R. 3043-5, 3056, 3059; J238 Roth Gerard Report, pp. 5-6, R. 3095-6).

<sup>4</sup> See Office of Network Study, *Television Network Programming*, Part 2, pp. 180-1, 301, 306-7.

<sup>5</sup> E.g., the Academy Awards presentation, the regular-season college football games, the 1968 Olympic games, and such major feature films as "The Bridge on the River Kwai" and "The Robe" (see J270, p. 8). ITT considers ABC programming equal to that of the other networks and would rely upon ABC for "prompt and imaginative" efforts in that area (Tr. 1170-1, 1991, 1954-5, 1986; BB25, R. 4396).

proposal (with Hughes Aircraft Co.) of a domestic satellite system to be used for broadcast transmission (J343, p. 13, R. 3871).

International Telephone & Telegraph Corporation (ITT), the acquiring company, is the 28th largest industrial corporation in the United States based on its 1966 sales of over \$2 billion.<sup>6</sup> ITT's principal field is the development, design, manufacture and operation of telecommunications and other electronic systems and components, in which it is one of the world's leading firms (J206, R. 2808-2845). Entry into broadcasting was regarded by ITT as "readily compatible with its basic communications operations" and as providing "ancillary benefits in the marketing area" (J238, p. 2, R. 3044; J232, R. 3029). In recent years, ITT has undertaken a diversification program in the United States, principally through the acquisition of more than 20 existing companies since 1960, and as a result is today also engaged in the business of consumer finance, life insurance, investment funds, small loan companies, car rentals (Avis) and book publishing (J206, R. 2808-45; J331, R. 3770-3806). Approximately half its domestic income has come from U. S. Government defense and space contracts (J188, p. 7, R. 2467).

ITT originally operated principally abroad and, notwithstanding an increase in its domestic activities, still derives about 60% of its income from foreign business operations which it maintains in at least forty countries, and where it has almost 80% of its employees (J331, pp. 2-3, 21, R. 3774-5, 3793). It is the largest international supplier of telecommunications equipment in the world and the foremost telecommunications firm in Europe, equalling its two other competitors combined (J188, pp. 1, 4, R. 2461, 2464). ITT has telephone operating companies in Latin America and operates a worldwide record communications network of more than 1,000

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<sup>6</sup> *Fortune Magazine*, June 15, 1967.

cable, radio and satellite circuits reaching every quarter of the globe (J331, pp. 6-9, R. 3778-81). Operation of telecommunications systems and sale of equipment involve ITT in close and confidential negotiations with high officials of foreign governments, regarding rates, cable and satellite rights, loans and credits, and other problems (see AR83, R. 1522-55; J184, R. 2436-46).

## *2. The Merger Agreement*

As the ITT board was advised in December 1965, when it voted to approve this merger, "for about two years we [ITT management] have been intensively researching the broadcasting industry, and closely following all developments that might lead to possible acquisitions, because of our brief that this industry represented one of the most attractive fields for potential ITT entry" (J238, p. 1, R. 3043). ITT's management had decided that its entry into broadcasting was going to be "significant" and "sizeable" (Tr. 1832-5, 1889-90, 1892). As part of this process, ITT officials scrutinized existing station groups, employing a broker to locate prospects among group owners (J208, R. 2850; J222, R. 2917-21; J227, R. 2983-4; Tr. 1108-15, 1194-7, 1830-1, 2631-8), engaged in negotiations with a number of individual station owners (J154-160, R. 2354-77; J173-J178, R. 2397-2402; Tr. 1013, 1030-1, 2600-2), and proposed that ITT build its own group, by acquiring individual stations and applying for UHF licenses (J178, R. 2402; J207, R. 2846-9). ITT believed that "groups of independent stations or large individual stations might also be attractive", and entry by these means was specifically considered as an alternative, during the course of the negotiations with ABC (J222, R. 2917-21; J227, R. 2983-4). But, ITT's policy was "not . . . to move aggressively in this direction" until it was "convinced that none of the three major networks (and their group of owned stations) might be available" (J238, p. 1, R. 3043).



In December 1964 and January 1965, ABC management was approached by an emissary on behalf of ITT concerning the possibility of merger between the two companies (J5, R. 1581; Tr. 1484, 2471). Although the discussion between ITT's president Geneen and ABC's president Goldenson were then unfruitful because the parties could not agree on terms (Tr. 1486-7), the ABC board expressed interest in considering such merger on favorable terms (J5, p. 2, R. 1582), negotiations were "kept warm" (Tr. 2495-6) and serious discussions were resumed in November 1965. The final negotiations in November-December 1965, which primarily involved the stock ratio (J5, pp. 3-4, R. 1583-4),<sup>7</sup> resulted in a letter of intent to merge, approved by the boards of directors of both corporations on December 7, 1965, proposing that each share of ABC stock be exchanged for 0.5719 share of ITT common stock and 0.5719 share of a new convertible ITT preferred stock issue (J9, R. 1606-8). This was calculated as equivalent to about \$85 per share of ABC, at a time when ABC stock was selling at about \$60-\$62 per share (J12, R. 1616; J232, R. 3029).

The formal merger agreement was executed on February 14, 1966 (R-1, Ex. I-4), and approved by the stockholders of both companies in April 1966. While ITT had the power under the contract to renegotiate the price, or to "walk away" from the merger until mid-April 1966, no one in ITT recommended that the merger be dropped or modified, and no investigation was thought necessary into ABC's capital investment needs, notwithstanding advice from ABC concerning the costs of conversion to color (Tr. 1033-5, 1039-43, 1298, 1300, 1303, 1411, 1431). At the evidentiary hearing in April 1967, Mr. Geneen expressed the belief that ABC's requirements were not so far beyond normal industry demands as to be of concern,

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<sup>7</sup> The other terms which the top managements of ITT and ABC discussed at that time, and of which they made written record, concerned the incentive plan, pension rights, stock options and salaries for the ABC officials (J10, R. 1609-13).

that ABC's attractiveness was established by the stability of its earnings and that the need for capital investment was a "transitory" problem (Tr. 1845-7, 2041-3).

### 3. *The Proceedings Below*

#### (a) *Preliminary Proceeding*

On March 31, 1966, ITT and ABC jointly filed application with the Commission for authorization to transfer seventeen radio and television station licenses from ABC to ITT, under Section 310(b) of the Communications Act of 1934, 47 U.S.C. 310(b). After requesting and receiving additional information as to the plans of the merging companies,<sup>8</sup> the Commission directed an *en banc* hearing, which was held on September 19-20, 1966. This two-day proceeding consisted primarily of statements by counsel for the applicants and their chief executive officers, a brief statement by members of the Commission's Broadcast and Common Carrier Bureaus and interrogation of the witnesses and counsel by members of the Commission. No examination of witnesses by an adversary party or by any representative of the Commission staff took place.<sup>9</sup>

<sup>8</sup> The application contained an exhibit "ABC—Past, Present and Proposed" which set out ABC's anticipated needs principally in terms of increasing programming costs (color conversion was referred to only as a cost which "will substantially exceed equivalent black and white equipment") (R-1, Ex. I-3, Att. H, pp. 19-23). In response to the Commission's request for more information regarding ABC's need for financial resources from ITT, among other factors, ABC advanced for the first time a claim that it had anticipated expenditures of approximately \$140,000,000 for plant and equipment which were "already known and planned by ABC" (R-23, letter of July 25, 1966, p. 3). These capital requirements were the principal basis of the cash deficit projected by ABC during 1966-70, see exhibit AR3, R. 146-93, and became a central issue in the evidentiary hearing.

<sup>9</sup> After this hearing, further information regarding ITT's foreign interests was requested from the applicants by letters signed by a minority of Commissioners (November 3, 1966—Bartley, Cox and Johnson; November 23—Cox and Johnson). In addition, after

In response to a request from the Commission, the Department of Justice forwarded its views on the competitive aspects of the merger in a letter dated December 20, 1966. The Department indicated that it was not prepared to institute suit under the antitrust laws on the basis of the information then available to it. The Department, however, specified a number of anticompetitive consequences which were of concern and required further consideration. It also raised questions about the validity of the claimed benefit of the merger, i.e., the providing by ITT of financial support for ABC, stating that the Department's investigation disclosed evidence in conflict with this claim. It urged the Commission to give serious consideration to the issues of competition and alleged benefit in its pending proceeding, and it pointed out that the Department's investigation had developed significant information, not in the Commission record, relevant to several of the public interest issues stated (R-87, App. A to dissenting opinion of Commissioner Johnson).

*(b) The First Commission Decision*

On December 21, 1966, the day after receiving the Department's letter, the Commission, by a 4-3 vote, approved the merger.<sup>10</sup> In its opinion the Commission stated that a review of the filings of the applicants had not indicated "any material questions of fact" and there was, therefore, no occasion "for the laborious and time-consuming process of accruing on a hearing record the voluminous matter already available in formal documentation accompanying the applications, in supplemental submissions by the parties and in published data." It was the

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reviewing the record of the hearing, the Department of Justice, which had earlier commenced an investigation of the ITT-ABC merger, concluded that the facts before it did not permit an adequate appraisal. The Department thereupon intensified its efforts and directed further inquiries to the companies (R-60, p. 5; R-64, p. 3).

<sup>10</sup> Commissioners Bartley, Cox and Johnson dissented.

judgment of the majority that the procedure followed "was extraordinarily painstaking and thorough and the most adequate in the circumstances of this case that our ingenuity could devise" (R-87, ¶¶ 9, 13).

The Commission found that the proposed merger would benefit the public in two major respects. The alleged "principal reason" for the merger, and its principal benefit, was that the merger would make available to ABC financial resources which it needed, and which were not available to ABC apart from the merger (R-87, ¶ 23). The Commission cited ABC's "necessity for making large additional capital investments", exceeding \$140 million, for conversion of existing studios to color broadcasting, purchase of a new headquarters building and construction of new studios. It also cited the cost of other network services, and found, on the basis of a representation made by ABC's president at the oral hearing, that ABC's overall borrowing was limited by outstanding loan agreements (R-87, ¶¶ 23-24). The second benefit was that the merger would promote the development of UHF broadcasting, as a consequence of ABC's increased strength and ITT's technological efforts (R-87, ¶ 29).

With respect to the possible anticompetitive effects of the merger, the Commission concluded that "the structure of broadcasting will be the same after this merger as it was before it" (R-87, ¶ 26). The Commission acknowledged that it is "not a part of our function to insure or impose competitive equality" among the networks, but it stressed that "the ABC television network had been operating at a loss" and it declined to "frustrate" ABC's efforts to "attain a profitable position" in its network operations (R-87, ¶¶ 33, 34). However, no appraisal was made of the profitability of the ABC television business as a whole—i.e., the network plus owned-and-operated stations.<sup>11</sup>

<sup>11</sup> The Commission also stated that it declined to take "more direct and drastic action to equalize competitive positions, such as by forcing a change in the affiliation of individual stations", be-

Finally, on the issue of possible influence of ITT's commercial operations on the broadcasting operations of ABC, particularly news and public affairs programming, the Commission relied on the assurances of the applicants that ABC's autonomy would be maintained within ITT and that the "freedom of the broadcast journalism function" would be maintained (R-87, ¶ 22). This, stated the Commission, "demands 'eternal vigilance' by all broadcast licensees" and the Commission promised its "continuing scrutiny for any indication that our reliance upon the assurances and safeguards set out on this record was not warranted" (R-87, ¶ 22).

Although the Commission's opinion of December 21, 1966 purported to take cognizance of the points raised in the Department's letter of December 20, 1966, the Commission did not, in this opinion, consider the impact of the merger either upon the potential competition of ITT in broadcasting, CATV and related fields or its potential activity in communications technology, points raised in the Department's letter of December 20, 1966. The CATV matters mentioned in the Department's letter were dismissed as not having "any realistic relevance" (R-87, ¶ 16) and no reference was made to the other competitive issues.

*(c) Proceedings on the Department's Petition for Reconsideration*

On January 17, 1967, the Department of Justice, pursuant to Section 405 of the Communications Act, filed a timely petition for leave to intervene in the proceeding, for reconsideration of the Commission order approving the merger, and for an order staying the merger until decision on the petition for reconsideration. The Department asserted that the Commission had failed to make an adequate evaluation of important issues bearing upon the

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cause such action would be "unwise, unwarranted, and incompatible with our basic mandate of maintaining a competitive system of free enterprise in the field of broadcasting" (R-87, ¶ 34).

application of the statutory "public interest" standard, and urged the Commission to reopen the record and to conduct a full evidentiary hearing (R-60).

On February 1, 1967, the Commission issued an order granting the Department leave to intervene and directed certain further proceedings on the petition (R-68). On March 16, 1967, the Commission directed the reopening of the record "for purposes of adducing supplementary evidence" in a hearing before the Chief Hearing Examiner of the Commission, to assure "compilation of a full record" upon the following broad public interest issues (R-90):

- (1) To determine the benefits to the public interest from the proposed merger;
- (2) To determine the detriments to the public interest from the proposed merger; and
- (3) To determine, in light of the evidence adduced on the above issues, and the entire record, whether the public interest will be served by a grant of the applications.<sup>12</sup>

The supplementary hearing was completed "with exemplary speed" between April 10 and April 26, 1967 (R. 4489-90), resulting in an evidentiary record of almost 3900 pages and more than 550 exhibits.

#### (d) *The Second Commission Decision*

On June 22, the Commission, by a 4-3 vote, issued an opinion and order denying the Department's petition for reconsideration and affirming the previous order approving the merger (R. 5290-5471). As amended by an "Errata" order issued June 27, 1967, the Commission stated (R. 5290, ¶ 86), that "We have not repeated the substantive discussion in the Commission decision [of De-

<sup>12</sup> The Commission directed that the Department and the Commission's Broadcast Bureau, which it made a party, would proceed initially with the introduction of evidence, but that the ultimate burden was on the applicants. The Examiner was to certify the record to the Commission for final decision (R-90).

cember 21, 1966], since the evidence in the supplementary record, although in much greater detail than previously before us, does not lead us to change conclusions previously reached *except as herein specified*. . . . The Memorandum Opinion and Order of the Commission entered herein on December 21, 1966, together with *and as modified by* this Opinion and Order, shall constitute the Opinion of the Commission" (emphasis supplied). The Commission did not specify or designate which prior conclusions or findings had been modified.<sup>13</sup>

One departure from the first opinion is evidenced in the findings on ABC's financial need. In contrast to the specific findings in December as to ABC's capital requirements and the unavailability of funds from other sources, the Commission after the evidentiary hearing declined to determine the extent of ABC's need or its ability to obtain practical alternative financing apart from the merger, stating that it was unnecessary to do so (R. 5319-20, ¶¶ 67-69). It found the financial benefit of the merger to be the promoting of "the best possible environment" for ABC operations by "making available funds to take risks and make the judgments necessary for the forward progress of ABC's news, public affairs, entertainment and other similar programming or related endeavors" (R. 5320, ¶ 69).

As to the anticipated benefits from ITT's technological efforts, the Commission based a finding that ITT's contributions to UHF technology would be "substantial" upon its imposition of a requirement, as a condition of approval of the merger, that ITT carry out a representation to work on UHF and file annual reports with the Commission for three years detailing its activities (R. 5307, 5322, ¶¶ 37-38, 72). ABC's contribution to UHF

<sup>13</sup> In the opinion as originally entered on June 22, before the so-called "Errata", ¶ 86 stated that "the supplementary hearing did not change *any of the* conclusions previously reached", and that the December 21, 1966 opinion "together with [but not *as modified by*] this Opinion and Order shall constitute the Opinion of the Commission" (R. 5330).



broadcasting was predicated upon a finding that it would be able to foresake reliance upon secondary clearances on VHF stations in favor of primary affiliations with UHF stations, and the Commission required annual reports for at least three years as to ABC's actions to fulfill its undertaking to do so in an unspecified number of markets (R. 5321, ¶ 71).

The only detriments the Commission found weighing against the merger were possible slight detriments in eliminating ITT's potential activity in the CATV field and in eliminating ABC's independent role in regulatory proceedings (R. 5303, 10, ¶¶ 27, 45). It rejected the claim that the merger had the adverse effect of eliminating ITT as a potential independent entrant into television broadcasting and networking, relying upon testimony that ITT did not intend to enter the network business, and upon the number of group owners of broadcasting stations (R. 5298-300, ¶¶ 14-18). It rejected the contention that the merger eliminated substantial independent efforts by ITT in CATV and pay-TV, relying upon testimony that ITT's decision in that field was an independent business judgment unrelated to the merger, upon the "very fundamental policy obstacles" in the way of developments competitive with the existing broadcasting industry, and upon the number of firms in the CATV field as listed in standard trade references (R. 5300-3, ¶¶ 19-28). It found no adverse effect upon potential technological developments on the ground that ITT is only one of many companies in technological fields related to broadcasting, the "basic technology" of satellite and cable communications being "well known", that technological advances have come from companies with broadcasting interests, and that fundamental changes will require decisions by Congress and the Commission (R. 5303-5, ¶¶ 29-30).

As to the autonomy of ABC in regulatory and commercial matters, the Commission relied upon the proposed "unique" relationship between ITT and ABC in the ITT organization; upon the companies' explicit representations



and assurances, especially an internal policy statement issued by ITT during the pendency of the proceedings, which the Commission found "not subject to the charge of being drafted for the purposes of this proceeding" (R. 5307-9, 5326, ¶¶ 40-4, 80); and upon "common knowledge and experience" of the way corporate organizations and boards function (R. 5308-9, ¶¶ 42-3). It found that even if a loss of ABC autonomy were assumed, it would not be substantially detrimental because of the calibre and ability of ITT management and the small area of conflicting interest between the companies (R. 5310, ¶ 45). The Commission found no substantial threat of anticompetitive consequences in the television advertising market, relying in part upon ITT's established policy, as expressed in its internal policy statement (R. 5314-5, ¶¶ 55-7).

The Commission held that there could not be "any reasonable doubt" that ABC's integrity and independence in the news, information and public affairs fields would be maintained. It dismissed evidence of improper conduct of ITT efforts to influence news media during the pendency of the proceedings on the ground that only one episode was improper, and that it was isolated in nature (R. 5322-5, ¶¶ 73-80). Finally, the Commission rejected the claim that it should consider the lack of candor by applicants' principal officers, stating that the testimony involved was "relatively minor" and, specifically discussing one such charge, that it could not be said to have involved a deliberate effort to deceive the Commission (R. 5327, ¶ 82).

#### INTRODUCTION AND SUMMARY OF ARGUMENT

On this appeal, the Department of Justice challenges the validity of the decision of the Federal Communications Commission that the merger of ITT and ABC is in the public interest. The Commission concluded that there were no significant detriments likely to result from this transaction, and that there were substantial benefits. The

Department of Justice is highly conscious of the deference which is due a regulatory agency's appraisal of the case. But it is not an intrusion "upon the domain which Congress has exclusively entrusted to an administrative agency" to insist that "the grounds upon which . . . [it] acted be clearly disclosed and adequately sustained"<sup>14</sup>—that it apply proper legal standards; that it carefully evaluate the evidence in the light of the proper criteria; and that it make clear and adequate finding upon the critical issues.<sup>15</sup>

We believe that the Commission failed to satisfy those requirements. Its first decision was made on a wholly inadequate record, without a hearing and in uncritical reliance upon the companies' representations. The evidentiary record has substantially undermined the basis for the decision; and the Commission, while abandoning certain of its previous essential findings, seeks to adhere to the same conclusions. "However unwittingly, the Commission seems to have assumed the defense of its [prior] grant, rather than the public interest, as its primary role in this proceeding."<sup>16</sup> The length of this brief arises from the need to analyze the Commission's reasoning, and the relevant facts in this voluminous record, upon a number of complex competitive and regulatory issues.<sup>17</sup>

The requirements of proper criteria and adequate findings are particularly important in a case of such moment

<sup>14</sup> *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 88, 94.

<sup>15</sup> E.g., *Saginaw Broadcasting Co. v. FCC*, 68 App. D.C., 282, 96 F. 2d 554, *Johnston Broadcasting Co. v. FCC*, 85 U.S. App. D.C. 40, 157 F. 2d 351; *American Broadcasting Co. v. FCC*, 85 U.S. App. D.C. 343, 179 F. 2d 437. See *Burlington Truck Lines v. United States*, 371 U.S. 156.

<sup>16</sup> *Clarksburg Pub. Co. v. FCC*, 96 U.S. App. D.C. 211, 215, 255 F. 2d 511, 515.

<sup>17</sup> Resort to the record facts is complicated here by the Commission's failure to rule upon the parties' proposed findings, evidently on the theory that the evidentiary hearing was only a proceeding upon petition for reconsideration. Compare the Administrative Procedure Act, 5 U.S.C. 557(c).

as this, involving the largest merger in the history of the broadcasting industry and one of the major networks. The broadcasting industry is highly concentrated. In particular, the existence of only three networks, with power over access to the broadcasting audience, has serious adverse consequences for competition in broadcasting and related industries.<sup>18</sup> The scarcity of network channels also has serious social and political implications.<sup>19</sup> Competition and diversity of expression, in short, are closely related objectives.

In considering these objectives, it is significant that under the Communications Act "the field of broadcasting is one of free competition," with the Commission having only limited powers, as compared to the comprehensive regulatory pattern applicable to common carriers (*Federal Communications Commission v. Sanders Bros.*, 309 U.S. 470, 475). This has several important implications for the present case. It means, first, that the industry

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<sup>18</sup> Concern has been expressed over the impact of this triopoly upon the industries engaged in program production (e.g., FCC Office of Network Study, Second Interim Report on Television Program Procurement, Docket No. 12783, issued July 2, 1965, pp. 209-215. FCC Notice of Proposed Rule Making on Network Interest in Programming, Docket No. 12782, 4 Pike & Fischer R.R. 2d 1589); and of certain practices on the many businesses utilizing television advertising (e.g., Hearings on Possible Discrimination in TV Advertising before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. (1966). *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568, 579).

<sup>19</sup> A recent study indicates that television is becoming the single most widely used and trusted source of information about news and public affairs (Roper Research Association, *Emerging Profiles of Television and Other Mass Media Public Attitudes 1959-1967* (1967)). The scarcity of channels limits the diversity of expression on matters of public concern over the uniquely popular and credible medium. It is also widely thought to be a cause of stereotyped mediocrity of television fare, as each station and network seeks to reach the largest possible audience, rather than to seek out important minority interests. See Expanded Use of UHF Channels, 21 Pike & Fischer R.R. 1711; Celler, *Antitrust Problems in the Television Broadcasting Industry*, 22 Law & Contemp. Prob. 549, 553; Note, 75 Harv. L. Rev. 1578, 1595.

structure is a matter of central concern. A high premium should be placed upon fostering additional entrants into network broadcasting to enhance competition and diversity; and principal reliance for the autonomy and independence of a network operation should be placed upon the independence of the business enterprise itself. These principles have been basic to regulatory policy for many years. They were well expressed by the Commission as long ago as its Report on Chain Broadcasting in 1941.<sup>20</sup> They are reflected in the recent legislation requiring that all television receivers be equipped to receive UHF.<sup>21</sup> And this Court has recently emphasized the appropriateness of relying upon structural arrangements to avoid unwarranted control in the broadcast industry, rather than upon "an excessive and impractical degree of day-to-day supervision" (*Metropolitan Television Co. v. FCC*, 110 U.S. App. D.C. 133, 135, 289 F. 2d 874, 876).

Second, the reliance upon "free competition" in broadcasting should be expected to produce a diversity of firms engaged in broadcasting and networking. This is plainly the purpose of the Commission rules which limit the number of station licenses any one person can hold.<sup>22</sup> The

<sup>20</sup> The Commission then prohibited a number of network practices on the ground that "the door of opportunity must be kept open for new networks" and it was not enough to assure "competition among the existing networks" (Report, p. 50); and it directed the divestiture by NBC of one of its two radio networks on the ground that this was necessary to assure their independent competitive efforts (Report, pp. 70-71). Federal Communications Commission, *Report on Chain Broadcasting*, issued May 2, 1941, in Docket No. 5060. The Commission's Chain Broadcasting Regulations were upheld by the Supreme Court in *National Broadcasting Co. v. United States*, 319 U.S. 190.

<sup>21</sup> 47 U.S.C. 303(s).

<sup>22</sup> FCC Rules and Regulations (TV) § 3.636, 47 C.F.R. 73.636. The basis for these rules is the Commission's view that "the vitality of our system of broadcasting depends in large part on the introduction into this field of licensees who are prepared and qualified to serve the varied and divergent needs of the public for radio service."

Commission does not control or guarantee success or profitability. Indeed, competitive injury to existing broadcast interests is not a ground for denying a license to a new entrant except in the extraordinary case in which the public interest in adequate broadcast service would be adversely affected.<sup>23</sup>

The basic scheme and policy of the Communications Act, therefore, require close scrutiny of a merger which may reduce the likelihood of potential network competition or the independence of a network operation, and critical examination of a claim that a merger is needed in order to increase the resources available to an existing and successful broadcasting company. We believe that the Commission failed to provide the requisite analysis or to make findings essential to sustain its conclusions. Since the companies have the burden of affirmatively showing that "the public interest, convenience and necessity will be served" by grant of their applications (47 U.S.C. 310 (b); R-90, p. 3), we will first discuss the alleged benefits of the merger, and then turn to the detriments.

## I

The Commission conclusion, that public benefit would result from ABC's access to ITT's financial resources, is not supported by essential findings, or evidence, of ABC's need for such resources. As a result of the evidentiary hearing, the Commission has abandoned its earlier specific findings of such needs. But the adding of financial resources to a broadcaster does not constitute a public benefit by itself. The Commission was obliged—and failed—to find deficiencies in ABC's performance and competitive position, detrimental to the public interest, which result from lack of funds; and that the funds are not available except by the merger.

<sup>23</sup> E.g. *Carroll v. FCC*, 103 U.S. App. D.C. 346, 258 F. 2d 440; *Coastal Bend Television v. FCC*, 97 U.S. App. D.C. 339, 231 F. 2d 498; *Southeastern Enterprises Co.*, 22 F.C.C. 605.

A. The opinion below does not analyze ABC's competitive situation in terms of its market share, its programming success, and other pertinent facts. The conclusion of "competitive disadvantage" is alleged to arise from ABC's lesser revenues and profits than CBS and NBC; its alleged coverage problem; the high cost of programming; and ABC's plant facilities. Some of the statements relied upon are plainly incorrect or misleading. In any event, the most that can be said is that ABC is not as profitable, or does not have as modern facilities, as CBS or NBC. There are no adequate findings which indicate deficiencies cognizable as affecting the public interest in broadcasting.

B. Furthermore, even if ABC had substantial present financial requirements, the merger's effect in making funds available does not provide a substantial public benefit unless ABC was unable to obtain the funds elsewhere. Contrary to the first FCC opinion, the record now demonstrates that ABC can finance its own needs, without the merger. The Commission ruling that it was "unnecessary" to determine whether ABC could do so is plainly erroneous.

C. Without specific findings of ABC's financial deficiencies or need, the Commission's conclusion comes down to the mere fact that ABC will be part of a larger company with more resources. Indeed, the Commission stressed that the benefit will be an improvement in ABC's "environment" and in its ability to take risks, especially in news, public affairs and "cultural" programming. The assumption that the public interest will inevitably be enhanced by increase in size and overall resources is error.

## II

A. The Commission also erred in finding substantial benefit to UHF broadcasting, anticipated from the companies' compliance with conditions in its order. The record presented a critical issue—whether the development of a fully competitive UHF was consistent, or in conflict,

with the interests of a merged ITT-ABC. The Commission did not resolve the issue with adequate findings, but instead relied upon the imposition of conditions upon ITT to work in UHF technology, and upon ABC to affiliate with UHF stations. We submit that the Commission's conditions cannot thus be "bootstrapped" into a principal benefit justifying the merger.

B. In any event, the UHF conditions are too vague and uncertain to provide a basis for a finding of benefits. The Commission stated that the parties' representations were regarded as binding commitments and required annual reports of their efforts. But the Commission has not specified any particular level of effort. The parties' representations were quite vague and indefinite. There is no way the Commission, appellant or other interested parties can effectively check on the parties' compliance in renewal proceedings.

### III

The Commission erred in concluding that the merger would have no significant adverse effects upon competition by (a) eliminating ITT as a potential entrant into broadcasting by means other than acquisition of a network; (b) foreclosing ITT's expansion into CATV and pay-TV; (c) eliminating ITT as a source of communications technology independent of the existing networks. The basic error was its failure to apply the proper legal criteria to appraise potential competition.

A. It is clear that ITT was determined to enter the television broadcasting industry, and that, absent this merger, it would have entered and become owner of a substantial group of stations. ITT would become, thereby, an important potential entrant into network broadcasting by virtue of the strong incentives it would have to enter the field, its large financial resources and its capabilities to overcome technological barriers. Applying antitrust criteria (which the Commission purported to do), the factors of resources and incentives are controlling in evaluating potential competition. Statements of



intention by corporate officials are not entitled to weight and the Commission erred in relying upon such ITT testimony. It also erred in concluding that there were other more likely entrants by listing group owners, without examining their resources, capabilities and incentives—and, indeed while disclaiming “any inference as to their competitive intention and status.”

. B. Similarly, as to CATV and related fields, ITT was engaged in a “full-scale effort” in 1965 prior to the merger agreement. The Commission concluded that ITT’s decision in January 1966 not to expand into those fields was independent of the merger. It failed to explain why it accepted the ITT testimony, in the face of conflicting testimony and contemporaneous documents. More important, the 1965 efforts demonstrated ITT’s abilities and incentives, and further activities (being considered by ITT) are recognized to be in conflict with the ABC merger. Again, the Commission erred in failing to give weight to these factors, and in relying upon the number of firms in the CATV field, without findings as to their comparability to ITT. It also erred in taking the view, contrary to court rulings, that the existence of regulatory control over CATV growth made unimportant the elimination of an aggressive potential factor.

. C. ITT is one of the leading firms in communications technology, with the resources to develop and promote advanced forms of transmission which could radically increase the channels of access to the public, and greatly enhance competitive possibilities in broadcasting. The merger foreclosed ITT’s independent activities in broadcasting, CATV, and related fields, which would have given it the strongest incentives to develop new forms of broadcast transmission. Instead, ITT would have a half-billion-dollar investment in the status quo of the existing industry structure. The Commission’s apparent belief that the merger would not adversely affect ITT’s technological activities is contrary to the record and to the applicable principles of competitive and regulatory policy. The Commission also again erred by relying upon legisla-



tive and regulatory jurisdiction; and by stating, without specific findings or evidence, and indeed contrary to the expert testimony, that so many firms are comparable to ITT that no detriment can be anticipated.

#### IV

A. The Commission erred in concluding that the merger will not affect ABC's autonomy and independence. Its decision is inconsistent with the applicable legal criteria, which hold that broadcaster autonomy depends upon independence of control and ownership.

It is also contrary to the record of the actual relations between the companies and the reality of ITT control. The Commission abandoned the original finding that ITT has "substantially autonomous" companies, in the face of the evidence of the pervasive, centralized control and coordination exercised by ITT headquarters and management. Reliance now rests upon proposed "unique" arrangements with ABC, principally that it will have a majority of "outside" directors. But all directors will owe the duty to act on ITT's behalf. The ultimate authority of ITT and its management is already recognized by ABC's board chairman, its top management and other officials. There already have been many contacts and efforts at coordination and supervision. It is, moreover, impossible for the Commission to police the parties' assurances, and to check upon ITT's influence, without "an excessive and impractical degree of day-to-day supervision."

B. The loss of ABC's autonomy would have a detrimental consequence upon regulatory proceedings in which much of the competitive struggle takes place in television and broadcasting. This is shown by ABC's initiative and enterprise (for example, in the satellite field) and by the contrast of RCA-NBC. It is apparent that the broadcast interest of NBC has been balanced with, and outweighed by, the common carrier interest of RCA. The Commission also erred in its view that the area of conflicting interests between ABC and ITT is too small to be of concern.

C. The Commission erred in concluding that there would be no detrimental effect upon competition in the television advertising market. Its uncritical acceptance of the representations that ITT companies purchase without regard to the rest of the ITT organization is in direct conflict with the record.

D. The Commission erred in finding no detrimental effect upon the independence and integrity of ABC's news and public affairs. The Commission failed to assess the pressures resulting from ITT's foreign interests and telecommunications operations, which involve it in close and confidential relation with foreign governments, and which are clearly of a different order than those of other broadcast licensees. The Commission also erred in relying upon internal corporate arrangements, contrary to the showing that ABC is likely to be controlled by ITT; that the independence of the ABC news department is not a sufficient safeguard; and that regulatory surveillance cannot be effective. Finally, the Commission erred in summarily dismissing the evidence of the efforts of important ITT officials to influence coverage of this very proceeding.

## V

The Commission erred in failing to give weight to the lack of candor of the applicants' principal officers in their testimony on material issues in this proceeding. The Commission, discussing only one episode, found no deliberate effort to deceive. But this misconceived the legal standard, which requires licensees to be forthright, frank and complete. That standard is particularly important here, because of the reliance placed by the Commission upon the assurances and representations of these officials.

## ARGUMENT

## I

**The Commission's Conclusion That ABC's Access to the Financial Resources of ITT Would Constitute a Substantial Benefit to the Public Interest Is Not Supported by Essential Findings or Evidence of ABC's Need for Such Resources**

The Commission concluded that the merger would benefit the public interest because ABC "will be significantly aided by having ITT's financial strength back of it", the merger will "promote the best possible environment" for ABC operations by "making available funds to take risks and make the judgments necessary for the forward progress of ABC's news, public affairs, entertainment and other similar programming or related endeavors" (R. 5320, § 69).

The Commission's present reliance upon the prospect of benefit from an improved "environment" and from future risk-taking is in striking contrast to the emphatic and precise findings in the Commission's December 1966 opinion. At that time, the Commission stated that ABC was "now confronted with the necessity for making large additional capital investments" in plant and equipment, which "will total over \$140 million". It was further found that "Commitments made under existing loan agreements limit further borrowing by ABC to \$6 million"; that consequently ABC needed "more funds than are available to it without the assistance of ITT," and the inability to get ITT funds would put ABC "at a substantial competitive disadvantage" (R-87, ¶¶ 23, 24). Public interest benefits, in short, were thought to result from ABC's urgent financial need and its inability to raise money. And since these made up the principal reason justifying the merger (R-87, ¶ 23), they became (as the Commission noted, R. 5315, ¶ 58) a principal focus of the evidentiary hearing.

As a result of the evidentiary hearing, the Commission has abandoned the original basis for this vital aspect of its decision. It does "not find it necessary to decide"

whether the present ABC plans for colorization and modernization are "merely afterthoughts, devised to convince the Commission of the desirability of the merger" (R. 5319, ¶ 67). It declines to determine the actual amount of ABC's required capital expenditures on the ground that such a finding "is not crucial to our decision. It is sufficient to note that they are substantial" (R. 5320, ¶ 68). And finally, the Commission declines to resolve the issue of whether ABC can obtain practical alternative financing for its needs apart from the proposed merger on the ground that the record "does not permit a definitive resolution of this particular facet" (R. 5320, ¶ 68), and that its resolution is "unnecessary and inappropriate" as a basis for decision (R. 5320, ¶ 69).

We submit that the conclusion of public benefit from ITT's financial resources is unsupported by essential subsidiary findings. The adding of financial resources to a licensee does not constitute a public benefit by itself. Plainly, it is necessary for the Commission to find (a) deficiencies in a licensee's performance or competitive position, detrimental to the public interest, which are attributable to a lack of funds; and (b) that the funds are not available from sources other than the merger. No such findings were made below—or could be made on this record. As a result, the conclusion was not a "rational inference from the findings of basic facts". *Johnston Broadcasting Co. v. FCC*, 85 U.S. App. D.C. 40, 46, 175 F.2d 351, 357; *Telanserphone, Inc. v. FCC*, 97 U.S. App. D.C. 398, 401, 231 F.2d 732, 735.

In *Braniff Airways, Inc. v. C.A.B.*, 113 U.S. App. D.C. 132, 135, 306 F.2d 739, 742, this Court held that "conclusory statements" that a licensee's competitive position would be strengthened were inadequate in the absence of subsidiary findings setting forth the alleged "worsening financial situation", "the degree to which [the order] . . . would affect its competitive position" and "the manner in which this would come about". Reversal is similarly required in this case.

**A. *There were no Adequate Findings or Evidence of Deficiencies in ABC's Performance and Competitive Position Attributable to Lack of Funds.***

In the Statement, *supra*, we have set forth briefly the pertinent facts about ABC's performance and competitive position—its substantial share of the market (about 27% of total network revenues, 31% of prime time); its effectiveness in obtaining competitive programming, including innovative leadership in some areas; its success in securing audiences, including prime time clearances virtually equivalent to CBS and NBC; its strong progress over the years to attainment of the present position, its present high profitability, and the excellent prospects for further growth.

The Commission does not attempt any analysis of ABC's competitive situation or of the facts above stated. Nevertheless, it reiterates that ABC is suffering from a "competitive disadvantage" (R. 5316, 5317, 5319, ¶¶ 59, 63, 65, 66). For this conclusion it appears to rely upon ABC's (1) lesser revenues and profits; (2) alleged coverage problem; (3) high cost of programming; and (4) plant facilities. We submit that, in each of these areas, the findings are inadequate to show a deficiency affecting ABC's performance or competitive position which is attributable to a lack of funds, and which would be cognizable as affecting the public interest in broadcasting.

(1) *Revenues and profits.* The Commission appears to rely principally upon the "fourfold increase" in the "revenue gap" between ABC and the average CBS-NBC revenue from 1961 to 1966, and ABC's lesser profits (R. 5316, ¶¶ 59-60). But the revenue figures are totally misleading. During this period ABC's market share has varied within only a few percentage points of the 27.5% it held in 1966. The phenomenal growth of television broadcasting revenues as a whole, in which ABC has fully participated, is the reason that the same difference in market percentage has a greatly increased dollar value. But it is clearly erroneous to infer that ABC is losing ground. In a period of such

rapid growth of the industry, ABC can even improve its market position, thus catching up with its competitors, while the so-called "revenue gap" in absolute dollars increases. ABC has had just such rewarding experience in some recent years, which it (and all observers) have correctly analyzed as high success.<sup>24</sup>

Nor does the difference in network profitability support a finding of competitive disadvantage. At the supplementary hearing, it was established by uncontradicted expert testimony<sup>25</sup> that calculation of a profit or loss for the networking operation—as distinct from the overall television broadcasting profit or loss which includes the owned and operated stations—is not a meaningful measure for evaluating the economic health of the network business. The network and its owned and operated stations are an integrated whole, and should be considered as an economic unit. During the entire period under consideration, ABC's television broadcasting business, considering its network and O & O's together, has been profitable (Tr. 3034-7, 3059, 3077; See J271, R. 3352; J272, R. 3553). By every normal standard, indeed, ABC is an extraordinarily successful and profitable company—the profit from its television business alone from 1960 to 1966

<sup>24</sup> See BB1, R. 4319. Note that the Commission measures revenue and profit "gaps" between ABC and the average of the other two networks. Obviously the "gap" between ABC and one of the other two networks is less than the average gap employed. The Commission's calculations tend to exaggerate ABC's deficiencies, and it is even possible that one of the other two networks has been closing ground substantially to ABC. This cannot be determined from the Commission's findings or discussion.

<sup>25</sup> This was testimony by Dr. Hyman Goldin, for many years Chief Economist of the FCC, more recently Executive Secretary of the Carnegie Commission on Public Television and Associate Professor of Communications, Boston University. Dr. Goldin (whose qualifications are set forth on J346, R. 3983) was the only expert in broadcasting economics to testify in the Commission proceeding.

At the non-adversary hearing in September 1966, the applicants presented an economist to testify, *inter alia*, to ABC's competitive difficulties and the absence of any adverse effects from the merger

amounted to \$125 million before taxes.<sup>26</sup>

The fact that CBS and NBC earn more profits than ABC does not detract from ABC's competitive and financial strength and it does not justify the proposed merger. ITT itself projected at the time of the merger that ABC, remaining in its third position, would be a highly attractive investment because of its strong competitive position, its financial stability, and its excellent growth and earnings prospects (J238, pp. 2-3, at tab "Financial", and attached Roth Gerard Report, pp. 5-6, R. 3044-5, 3056-9, 3095-6). There may be cases where a merging firm is so small and ineffectual as to be unable to achieve the scale of operations required for effective competition; and perhaps that can be said of ABC's situation 14 years ago, when the Commission authorized its merger with Paramount Theatres.<sup>27</sup> But no such argument can be made on the present record. As applicants' own economist admitted, equality of overall size and resources is not necessary for a company to be an effective competitor, and diversity of size may contribute to innovation and to competition (Tr. 733-8),<sup>28</sup> as it has apparently in the television industry.

on broadcasting (see ITT Ex. 12a, R. 32). At the subsequent evidentiary hearing, the Chief Hearing Examiner ruled that the applicant's expert was "not qualified to express an opinion on the broadcasting industry" (Tr. 827-8).

<sup>26</sup> J272, R. 3553. At the beginning of 1966, ABC's total capital investment in broadcasting (i.e., plant and equipment) was only about \$37 million (Tr. 2357; J274, R. 3561). ITT computed ABC's return on assets and on revenues as substantially higher than ITT's (J238, pp. 2-3, R. 3044-5).

<sup>27</sup> *Paramount Television Productions, Inc.*, 17 F.C.C. 264, especially pp. 319-20, 322, 348.

<sup>28</sup> In his cross-examination, Dr. Saulnier expressed agreement with the conclusions in that regard of several leading economists, Professors Adams and Dirlam, in "Big Steel, Invention and Innovation," 53 *Quarterly Journal of Economics* 167, 188 (1966); and "Steel Imports and Vertical Oligopoly Power," 54 *American Economic Review* 626, 652 (1964). A leading study of the problems of industrial organization has concluded that in at least half the U.S. manufacturing industries, leading firms are significantly



(2) *Coverage.* The Commission also cites, for ABC's alleged competitive disadvantage, the unavailability of station outlets for all three national networks in a substantial number of markets (R. 5318, ¶ 65). If this were truly an inherent obstacle for ABC built into the spectrum, it would not be remediable by ABC's access to funds, as the dissents stated last December (R-87, Opinion of Commissioner Bartley, p. 13; of Commissioner Johnson, pp. 49-52). But, in any event, the record demonstrates that the limitation on station outlets does not result in a fixed disadvantage for ABC. ABC now competes effectively for primary affiliations—in a number of important markets ABC has such an affiliate while one of the other two networks does not, e.g., Toledo, Birmingham, Raleigh, (AR62, R. 1265-8; Tr. 3039).<sup>29</sup> More important, the record shows that a network's competitive position is not properly measured by counting affiliations, but only by examining the clearances which it obtains for programming on its own primary affiliates and on stations with which it has secondary affiliation. This was established by expert testimony (Tr. 3037-8, 3040) and is confirmed by the evidence of ABC's experience. ABC's primary affiliates reach about 93.4% of the national audience (as compared with 98 or 99% for its

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"larger than necessary from the standpoint of efficiency in production and distribution"; and, also, that there is significant incidence in manufacturing and elsewhere, of "unnecessarily high" degrees of vertical integration from the standpoint of efficiency, "and thus of firm sizes which are 'unnecessarily large'". Bain, *Industrial Organizations* (1959), pp. 356, 358.

In dealing with competitive problems of mergers under the anti-trust laws, the courts have unequivocally rejected the argument that a merger can be justified by pointing to the existence of a larger, more dominant firm. *United States v. Philadelphia National Bank*, 374 U.S. 321, 370-371. *United States v. Bethlehem Steel Company*, 168 F. Supp. 576, 618 (S.D.N.Y.).

<sup>29</sup> Dr. Goldin pointed out that ABC has sometimes paid a higher compensation rate to local stations than is usual, in order to obtain primary affiliation. He also noted that CBS did the same when entering markets in the early 1950's, and has since stopped; it is a "temporary phenomenon" (Tr. 3039-40, 3085-6).



competitors), but the three networks are about equal in prime-time audience (Tr. 3040-1) as noted in the Statement, *supra*. It is clear that when ABC has popular programming, it obtains commensurate clearances (AR65, eighth tabulation sheet, R. 1292). The record shows, in short, as the expert testified, that the coverage problem is not a substantial obstacle to ABC's competitive success, and that its "most important" "growth possibility" lies in developing programming of the same degree of popularity as its prime-time shows during other parts of the broadcast day (Tr. 3045-7, 2350-6), an endeavor which ABC has been undertaking and which is well within its independent resources.<sup>30</sup>

(3) *Cost of Programming.* The Commission refers to the high cost of programming (R. 5319, ¶ 67). There is no doubt that the television network business involves large expenditures for programming. But ABC's president conceded in the September hearing that ABC can handle these requirements on its own (Tr. 573-4; see also Tr. 4079). Most of these expenditures are of course for entertainment and sports (more than \$160 million in 1966, Tr. 241, 265), and these large costs produce correspondingly large revenues. This was specifically illustrated in the record with regard to the costly feature films, such as ABC's \$2 million expenditure for "The

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<sup>30</sup> In this connection, the Commission referred to the so-called "drop-in" proceeding in which it rejected the proposal to add new channel assignments in the two-VHF markets, because that would have been in derogation of minimum engineering standards. The Commission concludes that it "cannot escape the necessity growing out of its own past actions of permitting ABC to attain a greater degree of competitive strength, or equality" (R. 5318-9, ¶¶ 64-66). It did not, however, make findings as to ABC's competitive performance in the period since the drop-in proceedings and did not spell out the extent of ABC's alleged coverage deficiency, or how the proposed merger would remedy it. The Commission apparently believed the merger should be approved because it owed ABC something for the earlier failure or unwillingness to find a solution to the problem of spectrum allocation and station availability. This sense of obligation does not, however, substitute for findings of benefits resulting from the merger.

Bridge on the River Kwai" (Tr. 1601-6, 2344-6; see also Tr. 572, 574). ABC's news and public affairs programming results in a deficit, as do those of the other networks, although ABC expects this deficit to be reduced as its news program builds up an audience (Tr. 575). In any event, the Commission does not find deficiencies in ABC's independent performance in the news and public affairs area which are traceable to inadequate finances. Just as ABC has not been handicapped by financial lack in entertainment programming (Tr. 4079), so it has succeeded on its own in greatly expanding its news and public affairs in recent years (see, e.g. 1964 Annual Report, J269, p. 11, R. 3512). The head of ABC's news department testified that he had never had his annual budget request turned down or reduced (Tr. 3290-1) and the further plans described to the Commission were created by ABC without regard to the proposed merger (Tr. 112-3, 265). Except for feature films, the financial projections presented by ABC for 1966-70 (AR3, R. 146-193), in support of the claim of financial need, did not even indicate programming costs, and lay no basis for a conclusion that a claim of financial need arises from programming requirements.

(4) *Plant Facilities*. Finally, the Commission refers to the inferiority of ABC's studios and production and technical facilities, as compared to those of CBS and NBC (R. 5139, ¶ 67). The other networks may have more modern, spacious facilities. But in view of the already effective competition of ABC, it does not follow that a competitive need exists with public interest consequences. Thus, the official responsible for ABC's plant and equipment called its Colonial Theatre in New York a "symbolic" need, because it is a facility "that the other networks have that we don't have in New York" (Tr. 2182-3). But he conceded that ABC did not have any present or foreseen need for the Colonial in order to broadcast its programs, and hence did not now intend to convert it for color use (Tr. 2142, 2231, 2254).

The evidentiary hearing addressed in detail ABC's claim that it needed to make a tremendous investment in its broadcasting plant by 1970, including conversion of studios to color and the building of new studio complexes on the East and West Coasts (and the consequent abandonment of some of the colorized studios). We showed that there was no substantial basis for ABC's representation to the Commission in July and September 1966 that it had "already known and planned" \$90.0 million in capital requirements "for constructing and equipping new studio complexes" (see Point V *infra*). And we demonstrated that the plans since devised greatly exaggerate its actual requirements.<sup>31</sup> These may be, in short, "things that ABC would like to do and contemplates doing and plans to do if the money is available" (Tr. 2544), as

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<sup>31</sup> Without reviewing this material in detail, it is enough to point out that the capital projections included conversion of the Colonial Theatre to color, even though there was no intent to do so (*supra*); the addition of two stories to a proposed technical building in New York because "as a matter of legal policy" it was decided to build to the maximum allowable height (Tr. 2167); an increase of 25-40% in cost estimates for certain projects between November 1966 and February 1967 (compare AR25, R. 337-91, with AR3, att. B, R. 164-93); the appearance in the February 1967 estimates, for the first time, of a projected \$41 million production services complex in New York (described as the "ideal", Tr. 2253), to be built by 1970, which was included in the projections despite a decision to originate less programming from New York (J324, R. 3735; Tr. 2737, 2767-8) and for which no plans are now available (other than a rectangle on AR31, chart 11, R. 426, which omits 10 stories claimed to be part of the project, Tr. 2155-8; but see Tr. 2746-7); and the absence of any showing that these costly plant expenditures are related to actual programming requirements. The fact that there is no such relation was proved by reviewing the utilization of ABC facilities for this and next season's program schedule, including the state of conversion to color broadcasting (Tr. 1521-2, 2080-92, 2228-30, AR31, charts 5 and 12, R. 419, 428; AR50, R. 1223-4), and the reliance on outside independent producers for most of the prime-time programming (Tr. 2090-1, 2227, 2238, 2241, 2245). Independent producers select their own facilities and would produce "in a barn" to get on ABC (Tr. 2230-1, 2236, 2241, 2245). ITT's expert in television plant systems testified that facilities planning cannot look more than a few years ahead, because of changes in technology and programming (Tr. 2734).

ABC's executive vice-president said. But they have not been shown to be remedies for deficiencies in ABC's present operations in any way that would affect the public interest standard.

In any event, as noted above, the Commission expressly declined to rely upon any specific finding as to the scope of ABC's capital plant requirements in the coming years. While expressing (in passing) disagreement with the Department's contentions, the Commission found it "unnecessary" to resolve the hotly-contested issue of the extent to which ABC's projections were "merely afterthoughts" and were not required for its effective performance. "It is sufficient to note", the Commission said, that the "required" expenditures are "substantial" (R. 5320, ¶ 68). But we submit that it is not sufficient to so note. In December 1965, ITT's president Geneen was advised by ABC that it faced "substantial" expenditures for conversion to color (Tr. 1391-2, 1849); and he and his staff projected \$25 million over five years, which he explained appeared to be within the range contemplated (Tr. 1841a-2a; see Tr. 1225-7). Obviously ABC will have capital needs for studio equipment and other facilities. The question is, however, whether these will call for an infusion of funds beyond ABC's own resources and capabilities. In the absence of a proper finding as to the extent of those needs, they cannot constitute a justification for the merger.

***B. There were no Adequate Findings of ABC's Inability to Obtain all Needed Funds Without Merger and the Evidence Establishes their Ability to do so.***

Apart from the absence of adequate findings defining ABC's financial requirements, the decision below is defective for the failure to find a connection between any such requirements and the need for merger. For the Commission has expressly declined to find whether ABC could obtain alternate financing on practical terms to meet its needs on the ground that the record "does not permit de-

definitive resolution" (R. 5320, ¶ 68), and that it was "unnecessary" to ascertain the facts (R. 5320, ¶ 69).

This hiatus in the Commission's reasoning requires reversal. It may be explicable by the very absence of a finding as to the extent of ABC's expected spending; it is difficult to see how a reasoned judgment could be reached as to ABC's financial potential without an estimate of the amounts involved. In any event, the gap is a fatal defect. It is "necessary" to find whether ABC can satisfy its needs without ITT's funds. For if it can, the merger's effect in making such funds available does not provide a substantial advantage to the public interest.

In fact, we submit that the record does permit "a definitive resolution" of this issue and indeed compels a finding that ABC is independently able to finance its own needs. At the supplementary hearing, it was disclosed that ABC is not subject to any contractual limitation on its overall borrowing (Tr. 1330; J297, R. 3660-80), contrary to the representation made by ABC's president in the September hearing (Tr. 567) and to the Commission's mistaken finding in its December 1966 opinion (R. 5301, ¶ 24). It was also shown that ABC has never made an investigation of its capabilities to finance a capital expansion program, and that it has not even discussed the problem with its principal financial institutions, from which it has raised \$97.5 million in recent years. Representatives of those institutions testified that they had never made a determination as to ABC's maximum borrowing power, and the Metropolitan Life official stated that his company's attitude would depend in part upon the purposes to be served by the financing, and it was prepared to entertain further requests at this time (Tr. 1324, 1327-8, 1332, 1360, 1365).

The company's independent financing resources were explored by the Department's expert financial witness, Dr. Burton of Columbia University, who demonstrated that ABC could develop an acceptable plan for financing even the entire expansion program claimed by ABC, by conventional resort to additional borrowing and to the

equity market on terms which would be quite reasonable and manageable—e.g., by a combination of common stock or convertible debentures and long-term debt (J350; R. 3997-4002, Tr. 3102-3, 3117, 3125-9, 3625-6). Indeed, ABC's president acknowledged that ABC could borrow the funds for the entire projected expansion (Tr. 1664-5); and even the applicants' financial witness, called to rebut Dr. Burton,<sup>32</sup> also concluded that ABC could develop such a "bankable plan" (Tr. 3605-8). The latter expressed their concern about the restrictions that might be imposed by lenders (to which the Commission also makes reference, R. 5320, ¶ 68), but it is clear that no serious thought had been given to the actual significance of any restrictions (Tr. 1664-5, 3610-1, 3794). Indeed, those mentioned appear to be mostly of the type already in ABC's existing debt instruments (Tr. 3794; J297, R. 3667-73), with which it has had no difficulty. The Commission makes no finding, and none could be made, that a future ABC financing plan would impose significant disadvantages upon it.<sup>33</sup> As Mr. Geneen stated, ABC's requirement for capital is at most a "transitory" problem which does not impair the company's value and prospects and it is not beyond what would normally be anticipated (Tr. 1845-7, 2041-3).

<sup>32</sup> See R. 5370-2, dissenting opinion of Commissioners Bartley, Johnson and Cox, pp. 37-39.

<sup>33</sup> The record is also clear that the equity market is available to ABC. Indeed, the present management is apprehensive about the equity market because of the eagerness of some financial interests to buy into the company, which might threaten the management's position. Forestalling such an event was one of the advantages of the proposed ITT merger specifically discussed at the ABC board meeting in December 1965, which approved the merger (Tr. 2408-11, 2478-9).

As the Commission's own staff appraised the evidence on this point, "The record establishes that availability of additional cash resources to ABC resulting from the proposed merger would have little effect in increasing ABC's share of network revenues" (Tr. 4079), and that ABC can obtain all funds "needed on the open market," without the merger (Tr. 4076, 4084).

The record evidence on this point deals with ABC's ability to handle the *entire* program of projected expenditures set forth on the companies' Exhibit AR3. It is clear that the actual needs justified by ABC's programming requirements could be met by an independent ABC without difficulty. Of course, insofar as this Court's review is concerned, it is sufficient that the Commission has simply failed to find to the contrary.

*C. The Commission Erroneously Adopted a Standard which in effect Assumed the Benefit of Merger with a Large, Diversified Enterprise.*

We have shown that the conclusion of financial benefit cannot stand, because of the absence of essential findings to show that ABC suffered from deficiencies attributable to lack of funds and that it was unable to obtain the required funds on its own. But the Commission's failure to make such findings on the need for ITT financing raises a basic question as to its underlying regulatory judgment—that is, the legal standard applied by the agency to a merger such as this, of a broadcast network with a large, diversified enterprise.

The Commission's conclusion was that ABC access to ITT finances will provide "the best possible environment" for taking risks and making forward progress in programming. Without specific findings of financial need, we believe this conclusion comes down to the mere fact that ABC will be part of a larger company with more resources.

The Commission does not conceal this element of its judgment. It emphasizes the fact that networks undertake loss operations in news, public affairs and "cultural" programming, and it appears to find the chief benefit from the merger to be that ABC will be able to increase these loss operations (rather than its revenues or profits) (R. 5317, 5320-1, ¶¶ 62, 69-70).<sup>34</sup> It thus goes beyond

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<sup>34</sup> There is, of course, no evidence that ITT is likely to seek to lessen ABC's profits in order to improve news, public affairs or cultural programming. ITT's interest in this merger was in ABC's



holding that such desirable features of a broadcast schedule depend upon "financial prosperity and resources" of a network (R. 5321, ¶ 70). The finding of an improvement in these areas from the ambience of ITT funds—without specific showing of deficiencies or needs—must mean that the Commission believes the likelihood of such benefits are inevitably enhanced by any increase in size and resources. The point is driven home by the Commission's citation of Mr. Fred Friendly's book as indicating that CBS is at a disadvantage in presenting news and public-service programming because it is not part of a large complex, like NBC (R. 5321, ¶ 70). This approach could be used, in short, to justify any merger of a network (or a broadcaster) with a large conglomerate enterprise. We submit that it is an impermissible ground for Commission decision.

The Commission's treatment of the news issue (Point IV-C, *infra*), demonstrated a failure to appreciate the risks to the broadcast function of combining a network with a large, conglomerate organization. Concern with that problem should have led the agency to demand a high standard of proof of specific benefits to justify such a merger. Instead, the Commission has improperly "loaded

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profits and the cash flow expected (J238, pp. 2-3, R. 3044-5; J209, R. 2856-7; J213, R. 2865-78; J232, R. 3029).

ITT's management system, indeed, is organized to achieve the best earnings performance from all divisions and subsidiaries. The president of one ITT subsidiary testified about how his company is monitored and closely supervised by ITT headquarters in terms of its revenue and profit performance (Tr. 911-13). See also *Business Week* magazine's recent review and interviews with the responsible ITT officials dealing with its operations abroad. ITT Europe's business plan "pushes financial goals down through the organization even to the shop foreman". Its management was proud that it was so sensitive to the economic indicators of a drop in demand for electronics and telecommunications products in early 1966 that it quickly laid off 10,000 employees, permanently closed three plants and temporarily shut down other surplus capacity. As a result, ITT's Europe profits were only off 3% while its competitors suffered more serious reductions. *Business Week*, June 24, 1967, pp. 58-62.



the scales"<sup>35</sup> in favor of the merger by in effect assuming benefits from large size and diversification and by relying upon speculative improvements from an "environment." It is particularly disturbing that the excuse for this skewed standard is the desirability of news, public affairs and "cultural" programs—as if such programming was an act of magnanimity by a network, for which the public must pay the price of huge profits and great corporate size. On the contrary, we believe that such programming is an essential part of a complete network schedule and that there is sufficient demand for it by affiliates and the audience. In any event, it is an essential element in the responsible operation of networks and stations in the public interest, which the statutory scheme enjoins the Commission to attain by its control over grant of licenses and renewals. The Communications Act anticipates a competitive environment (*Federal Communications Commission v. Sanders Bros.*, 309 U.S. 470, *supra*, pp. 17-19), which normally would be characterized by diversity of licensees. If financial injury to an existing broadcaster is not a ground of itself for denying a license to a new entrant (*supra*, p. 19), surely the adding of financial resources or greater size to an existing broadcaster is not a public benefit *per se*. It is error to take it to be a public benefit, without specific findings on the need and application of funds, as the Commission did in this case.

## II

### **The Commission Erred in Finding That Substantial Benefits to UHF Broadcasting Would Result From the Companies' Compliance With Vague and Uncertain Conditions in the Order Below**

The Commission's second ground of benefit from the merger was an anticipated contribution to the development of UHF. This is foreseen to result from ITT's efforts in UHF technology and ABC's affiliations with

<sup>35</sup> Cf. *ICC v. J-T Transport Co.*, 368 U.S. 81, 89-90.

UHF stations. We submit that the Commission's conclusion is not supported by essential findings as to the effect of the merger and that the reliance upon the Commission's own order as a source of benefits was legally improper. Further, the conditions imposed by the order below are too vague and uncertain to provide a basis for a finding of benefits.

***A. The Commission Improperly Relied Upon its own Conditions as a Source of Benefits***

The hearing record posed to the Commission a critical issue—whether the development of a fully-competitive UHF was consistent with the interests of a merged ITT-ABC. On this point, testimony was presented by Dr. Hyman Goldin, the only expert in broadcasting economics who appeared at the hearing, *supra*, p. 28, fn. 25. Dr. Goldin testified that while ABC had a larger interest than its competitors in improvements in UHF, because it lacked affiliates in some markets, a fully-competitive UHF would be to ABC's disadvantage. It would make possible the entry of additional networks and would reduce ABC's audience share (Tr. 3053). ABC's long-term interests, therefore, are the same as those of the other two networks.

The adverse effect upon ABC of UHF development would demonstrably be more substantial than any countervailing improvement in coverage. ABC's disparity in prime-time audience is very small and it already obtains 31% of combined network prime-time revenues on the basis of its present affiliation and clearance arrangements, and about 27% of total combined revenues. As noted above, when ABC offers competitive programming, as in prime time, it has been able to obtain the necessary clearances to make it competitive with NBC and CBS. ABC has an incentive to close the small gap between it and its competitors, or to exceed them, but not by methods which would lay the basis for new network entry as would the development of fully-competitive UHF. For the entry of additional

networks would almost certainly cause ABC's revenues to drop well below its present share of almost one-third. Moreover, Dr. Goldin pointed out that ABC's coverage problem was relatively unimportant as compared to the programming aspect of ABC's present and prospective performance. He stressed that ABC's "most important" "growth possibility" lay in its development of programming of the same degree of popularity as their evening shows during other segments of the broadcast day (Tr. 3045-7; see *supra*, pp. 3-4, 30-31).

This expert judgment of ITT-ABC's economic interests regarding UHF advance was buttressed by the other evidence of record. ITT's president acknowledged that developments which would increase channels of access to the public would be "harmful" and "adverse" to ABC's position in the present broadcasting structure and to ITT's investment in it (Tr. 1857-8). This was stated with reference to direct satellite-to-home broadcasting and cable networks, but is equally applicable to a competitive UHF. Indeed, the lack of effectiveness of UHF competition was one of the favorable factors which ITT perceived when it decided to acquire ABC. ITT's analysis of the industry pointed out that "limited access to new competitors" was a most important ingredient in the tremendous profitability of television broadcasting, and ITT's profit projections for ABC were based upon a growing demand for TV advertising and the relatively fixed supply of time, including the lack of effective UHF competition (see J238, pp. 2-3, R. 3044-5; J238, Roth, Gerard Report, pp. 3, 8, 10, 11, 21-2, 28, R. 3093, 3098, 3100, 3101, 3111-2, 3118).<sup>36</sup>

As to ABC's attitude, the president of the network, Mr. Moore, candidly stated that ABC's decision whether to affiliate with UHF outlets in markets where it has no

<sup>36</sup> ITT was advised that ABC's "relatively permanent" "coverage disparity" had a beneficial side, since the "same station scarcity factors" which caused it would also "insure that the industry is closed to a fourth network" (J238, Roth Gerard Report, p. 3, R. 3093).

VHF primary affiliate depended upon its appraisal of the revenues from secondary clearances on VHF outlets as against the anticipated revenues from a UHF affiliate; on that basis, it has refused UHF affiliations on at least 10-12 occasions (Tr. 3334-5; J353, R. 4019-20, AR63, p. 2, R. 1272). Even ABC's representation that it expected to rely more on UHF in the future was coupled with the statement that "it would be a disservice" for ABC not to try for opportunities on VHF stations when it has them (Tr. 205). It is also highly significant that while ABC has requested technical help from ITT since the merger agreement on projects which it believed "to be useful for future utilization by the network", these involved a color camera, microphone system and other devices (AR 42, R. 865; Tr. 2748, 2853-4), and no such request was made regarding UHF (Tr. 2749, 2854).<sup>37</sup>

The Commission, however, describes in some detail an ITT memorandum, prepared by its technical director for Mr. Geneen shortly before the FCC hearing in September 1966, which listed various ways in which ITT's resources might be applied to UHF problems, and a few projects in existence in ITT European companies which could be utilized (R. 5305-6, ¶ 36; J262, R. 3362-6). This listing was concededly done for the purposes of the Commission hearing (Tr. 2837).<sup>38</sup> To be sure, steps were taken after the September hearing, so that by the time of the supple-

<sup>37</sup> An ITT official reported conversations with ABC regarding UHF technology, but these were not initiated by ABC, and were the result of his receiving an assignment from Mr. Geneen (Tr. 2748-9).

<sup>38</sup> Contrary to the Commission's opinion (R. 5306, ¶ 36), there is no statement in the above-cited document that ITT laboratories "would be used" for any purpose benefitting ABC and broadcasting. The document is entirely in terms of possible applications of resources, things which ITT "can do with its technical resources" (J262, pp. 3-5, R. 3364-6). Indeed, it contains some information irrelevant for any but forensic purposes—such as ITT's total annual spending for R & D in telecommunications, and the total number of engineers it employs world-wide, unrelated to UHF or broadcast technology (J262, pp. 3-5, R. 3364, 3366).

mentary hearing in April 1967, Mr. Geneen was able to report that ITT had made arrangements to import set components and a UHF transmitter (equipment which ITT companies had already developed in Europe, not the result of any new technical work) (Tr. 1941-3, 2842-44). The Commission (R. 5322, ¶ 72) mentions but does not rely upon the current activity, perhaps because of the testimony of ITT's technical director that the present projects were undertaken without the market analysis which usually precedes ITT's technical projects, and which is intended to measure cost against benefit for the company, and his explanation that these projects were a "fetish" of Mr. Geneen's (Tr. 2844-7, 2860-1). As shown in our discussion of anticompetitive effects in technology, Point III-C *infra*, ITT companies are expected to shape their technical efforts to the overall economic interests of ITT. It would appear (see Point III-C) that the long-range economic interests of the merged company are a more reliable guide to its future UHF activities than the impulse of ITT's president in the course of this proceeding.

The Commission itself does not resolve this issue with adequate findings that the merger itself will result in substantial benefits to UHF.<sup>39</sup> Indeed, as to technology outside the UHF field, the Commission explicitly disclaims any such reliance upon the parties' economic incentives. For, it states that while the merger would bring ITT into the technical side of television broadcasting in the United States, it was quite "impossible to determine from this record how far ITT will enter" this field (R. 5307, ¶ 38). The Commission's further statement that ITT's entry "in the UHF field . . . must be substantial" (¶ 38) is not based upon any difference in the record between UHF and other technical work, but solely upon the Commission's own act in imposing a con-

<sup>39</sup> In the light of the above record, the parenthetical remark that the parties' representations "obviously serve [their] economic interest" (R. 5305, ¶ 36) is insufficient.

dition upon approval of the merger (R. 5306-7, 5322, ¶¶ 37-38, 72).

As to ABC's anticipated activities, the Commission finds that ABC "will in a certain number of markets be able to foresake reliance upon secondary clearances on VHF stations in favor of primary affiliations with UHF stations" (R. 5321, ¶ 71). This ability is said to arise from ITT's "resources and backing" (¶ 71) since it will mean less revenues for ABC, as is evident from the testimony of the ABC network president cited above. The fact that it is to be done after the merger in an unspecified "certain number of markets" was volunteered only by ABC counsel in the course of interrogation by a Commissioner during the final oral argument (Tr. 4176, cited in ¶ 71). No official of ABC testified that ABC would undertake any specific UHF affiliations.<sup>40</sup> Counsel's statement was not, therefore, evidence of the probable effect of the merger but constituted a tender of a promise in exchange for approval. As Commissioner Cox then stated (Tr. 4176-7), this proposal is equivalent to imposing reduced ratings and smaller audience upon the very network which claims to be suffering from such burdens and seeking relief. In its first opinion, the Commission stated that it would not seek to help ABC by "forcing a change in the affiliation of individual stations" (R-87, ¶ 34). Now it is willing to "force" ABC to change affiliations, and relies upon this condition as a substantial benefit of the merger.

We believe that the Commission was obliged to resolve the issue of ITT-ABC's economic interests and incentives and to determine the validity of the merger's alleged benefits for UHF broadcasting, apart from any conditions imposed in an order of approval. In comprehensively regulated industries, the rule is that the determination of the public interest in a merger requires the agency to appraise and balance the detriments and bene-

<sup>40</sup> See the testimony of ABC's president in the September hearing, Tr. 108-9.

fits "which will result from the proposed consolidation" (*McLean Trucking Co. v. United States*, 321 U.S. 67, 87). It is customary and proper for agencies to impose conditions, to ameliorate anticipated disadvantages. But we are aware of no case in which the agency's order imposed conditions in order to create a benefit, and then found that benefit to be a principal ground for approving the merger. The reason, we submit, is that reliance upon such artificial benefits could in effect result in evasion of the statutory requirement that the transaction be found to serve the public interest. *A fortiori* is this true in the broadcasting field, in which free competition is to govern, and "an excessive and impractical degree of day-to-day supervision" is to be avoided (*Metropolitan Television Co. v. FCC*, 110 U.S. App. D.C. 133, 135, 289 F. 2d 874, 876). We submit in short, that the conditions cannot be "bootstrapped" into benefits justifying the merger.<sup>41</sup> This is especially so on this record, since as noted, the long-run interests of ITT-ABC appear to be inconsistent with development of a fully competitive UHF; and since the Commission's conditions are too vague and uncertain, as we show below.<sup>42</sup>

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<sup>41</sup> Cf. *Office of Communication of United Church of Christ v. FCC*, 123 U.S. App. D.C. 328 340-343, 359 F. 2d 994, 1006-9, where the Court held that it was error to grant renewal of a station license in reliance upon the imposition of conditions requiring that the licensee would operate properly in the face of past misconduct. The Court stated that it was essential for the Commission to make findings that the grant would serve the public interest.

<sup>42</sup> Furthermore, the conclusion that the merger "will result in significant and important technological advances [in UHF] that the American public might otherwise be denied" (R. 5306-7, ¶ 37) is lacking another essential finding. For the Commission has made no appraisal of the UHF technology market, the number of other firms in the field, or their resources and capabilities. The inadequacy of the Commission's decision in this respect is pointed up by its own recent action, since the decision below, in addressing inquiries to ten set manufacturers, pressing them with regard to their efforts to develop and use convenient tuning devices for UHF channels. This is one of the areas in which Mr. Geneen asserted ITT would be in a position to make an unusual contribution (Tr. 1943) and it is revealing that the Commission did not see fit to contact ITT. (The design and manufacture of set components



**B. *The UHF Conditions Imposed by the Commission are too Vague and Uncertain to Provide a Basis for a Finding of Benefits***

Even if the imposition of conditions can properly ever give rise to benefits justifying a merger, we believe that the conditions in the order below are not adequate to do so. The conditions are too vague and uncertain for the hoped-for results to be assured or for compliance to be enforced.

ITT is told that its representations are regarded "as a commitment that must be fulfilled" and it is required to submit annual reports for three years "giving detailed accounts of the nature and extent of ITT's efforts, including the amounts expended and planned to be expended" (R. 5322, ¶ 72). But the Commission does not specify any particular level of effort to be attained, or any particular projects to be undertaken. The uncertainties of R & D work, and the absence of any practical criterion in the Commission's opinion, will make it nigh impossible to judge whether the unspecified representations have been carried out, and whether the coming reports will be adequate.

Nor can this lack be remedied by reference to the ITT statements in the record. As noted, J262, the background paper prepared for Mr. Geneen's use at the September hearing, was simply a catalogue of possibilities. Mr. Geneen's "representations" in his testimony consisted of descriptions of the transmitters and set components already developed by ITT's European companies (Tr. 1941-3); but these were not presented as commitments since he made clear his reliance upon ITT technical staff as to all projects (Tr. 1941, 1949).<sup>43</sup> Mr. Geneen also described

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is plainly quite different from the advanced areas of communications technology, in which ITT is one of the leading firms—discussed in Point III-C, *infra*.)

The Commission's letter, and the list of recipients, are set forth in an appendix to this brief, *infra*, pp. 122-3.

<sup>43</sup> ITT's technical director, in his testimony referred generally to a "fairly elaborate" UHF program (Tr. 2861) but did not specify its content, so that there is no standard against which to measure



a possible systems approach towards community-wide UHF set conversion, but he made clear that any further work on this would depend upon ABC's interest and the economic incentives (Tr. 1943-6, 2052-3). In addition, Mr. Geneen repeated advice of his technical staff that, in view of ITT's current European expenditures of \$30 million in the high frequency field, an additional \$3-5 million might be the equivalent of adding \$15 million to broadcasting research and development (Tr. 1940). But no commitment was made to make such investment, and no breakdown of projects was advanced. Moreover, the existence of many ITT technical projects generally related to high frequency, but unrelated to the proposed merger, would enable ITT to make an accounting tabulation of UHF expenditures without the Commission, appellant or other interested parties having any way of appraising the portion which may have been undertaken in compliance with the order below. And, even if allocation is possible, we fail to see how compliance can be determined since no level of effort has been prescribed.

A similar defect undermines the condition applicable to ABC, that it will affiliate with UHF stations in "a certain number of markets," (R. 5321, ¶ 71). The Commission does not specify the "certain number", or the nature of the markets in which such affiliations are to be made. Again, it is clear that, absent the merger, ABC has in the past added UHF affiliates and will continue to do so (Tr. 205), much as its competitors have done (J262, p. 2, R. 3363). It is asserted that ABC will speed up the process. But the counsel who represented that an unspecified number of UHF affiliates would be made after the merger also asserted that "it would be a disservice" for ABC not to prefer its opportunities on VHF (Tr. 205), and that in some markets "the public would be better served" if ABC got the VHF affiliate instead of its competitors (Tr.

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future efforts. He also made reference to J262, and described the importation of a UHF transmitter and tuner diodes, referred to above, from ITT European companies (Tr. 2842-4).

4175-6). Moreover, there are markets in which ABC, while lacking primary affiliation contract with a VHF station, is nevertheless highly successful in obtaining clearances on VHF under a secondary affiliation contract (e.g., Dayton, Charlotte, see AR65, R. 1285-92). As noted, ABC already is prepared to affiliate with UHF stations where it believes such an arrangement would be profitable (Tr. 3334-5).

The Commission does not indicate whether ABC must undertake UHF affiliations which cost it substantial loss in revenues, or how significant a loss will excuse its failure to do so. Silence on this point, as well as to the failure to specify a particular number of UHF affiliations or any way of measuring an increment attributable to the merger, leave the Commission, the merging companies, appellant and other interested parties no way of ascertaining whether this condition has been complied with.

The lack of definiteness in the two UHF conditions is of especial significance in the light of the nature of the sanctions available to the Commission. Essentially, the Commission will have to judge compliance with the order below in considering renewals of ITT-ABC's seventeen broadcast licenses. The severity of the possible penalty makes it essential for the agency to prescribe orders which "are sufficiently clear and precise to avoid raising serious questions as to their meaning and application" (cf. *FTC v. Henry Broch & Co.*, 368 U.S. 360-368). In this case, it is inconceivable that the "cumbersome weapon"<sup>44</sup> of denying renewal could seriously be entertained on the basis of the vague and uncertain commands of these conditions. If such conditions are to be at all meaningful, precise and comprehensible tests for compliance must be afforded. This the Commission has failed to do. The UHF conditions cannot be relied upon to provide benefits justifying the merger.

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<sup>44</sup> *Regents v. Carroll*, 338 U.S. 586, 602.

## III

**The Commission Erred in Concluding That the Merger Would Not Have Significant Anticompetitive Effects Upon ITT's Potential Activities in Broadcasting and Related Fields; Its Analysis Was Premised Upon Improper Standards and Omitted Essential Findings**

The Department of Justice contended before the Commission that the merger of ABC and ITT would have a detrimental effect upon competition and the public interest by eliminating or substantially diminishing ITT's incentive to participate actively in one or more of the following fields: (1) entry into broadcasting and eventual development of a new television network; (2) the development of cable television (CATV) systems which would offer services competitive with the existing conventional broadcasting structure; and (3) the development of new methods of broadcast transmission, such as direct satellite-to-home broadcasting and interconnected cable networks, which could vastly expand the channels of information and entertainment available to the public. In its opinion after the evidentiary hearing, the Commission held (R. 5294, ¶ 7) that "criteria drawn from antitrust experience" are to be used in appraising the competitive issues in this case.<sup>45</sup> Purporting to do so, it then concluded that the merger would have no significant anticompetitive effect in any of the above three areas. In our view, the Commission failed to apply the proper legal standards for appraisal of potential competition, which require analysis of objective factors of the resources, capabilities and incentives of the companies under considera-

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<sup>45</sup> The Commission accepted the Department's contention that it is proper and customary for regulatory agencies to look to antitrust experience and to the criteria developed in antitrust cases when they consider competitive issues under broad public interest authority. This has been done, *inter alia*, in defining unfair trade practices (e.g., *Contract Rates on Rugs and Carpeting*, 313 I.C.C. 247, affirmed 194 F. Supp. 947 (S.D.N.Y.), affirmed 368 U.S. 349), and in considering the effect of merger with a failing company (*United-Capital Merger Case*, 33 C.A.B. 307, affirmed 303 F. 2d 394 (C.A.D.C.)).

tion. For that reason, it also failed to make essential findings to support its conclusions.

As we will show more fully below, ITT had unusually strong resources, capabilities and incentives to make a substantial competitive contribution. Before the proposed merger, for example, it was prepared to enter broadcasting by means other than acquisition of ABC, which would make it a likely independent entrant into network broadcasting; and it was undertaking serious efforts in CATV, pay-TV and related fields. The company might not have pursued all the activities under consideration, but the number of potential avenues increased the likelihood of its effective competitive efforts. The potentiality of new network entry would involve, moreover, the use of cable systems, satellites and other technological advances to overcome the present limitations on station outlets. ITT's leading position in communications technology, which led it to contemplate cable television grids or networks, would be an important factor in its own future activities—or could serve other potential network entrants—absent the merger. The Commission did not properly consider the resources and incentives of ITT; it placed undue reliance on testimony concerning the intentions of corporate officials; and it failed to make essential findings as to the resources and incentives of companies alleged to be comparable to ITT.

At the outset, we note our disagreement with the basic approach which appears to underlie the Commission's consideration of these issues, that is, its failure to appreciate and to give adequate weight to the importance of fostering additional network competition. Instead of acknowledging the disadvantages of the existing network triopoly (*supra*, p. 17), the Commission majority has expressed general satisfaction with the present structure and performance of the three-network television industry (R-87, ¶ 40). In contrast to the national policy of furthering new entry and diversity in network broadcasting inherent in the regulatory scheme (*supra*, pp. 17-19), the Commission repeatedly stressed its desire to provide

"a greater degree of competitive equality" between ABC and the other two networks (R. 5319, ¶ 66).<sup>46</sup> Indeed, the Commission belittled the relevance of concern with new network entry. In discussing whether ITT was a potential entrant into network broadcasting, the Commission suggested that networking is a kind of natural oligopoly necessarily limited to three companies "because of the economic limitations of the demand for network advertising, the supply of network product or programming, and the technical limitations of network outlets" (R. 5299, ¶ 17; see also ¶ 16). And it similarly disparaged the value of preserving aggressive innovative forces in CATV, pay-TV and in new forms of broadcast transmission which could greatly facilitate competition and diversity in network broadcasting on the ground that legislative or regulatory policies were involved (R. 5302, 5304, ¶¶ 26, 32).

The Commission's assumption that a network triopoly is inevitable and desirable not only contradicts basic national policy, but in fact runs counter to the showing in the record that conditions for new network entry are now attainable. The firm and growing demand for television advertising will provide the necessary economic base, especially if costs of transmission can be reduced.<sup>47</sup> And

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<sup>46</sup> By contrast, note that when the Commission adopted the *Report on Chain Broadcasting*, *supra*, p. 18, it specifically rejected a proposal of Mutual, then the weakest of the radio networks, which would have modified the restrictive practices of the stronger networks only to the extent necessary for Mutual's effective competition against them. The Commission said (Report, p. 50): "The effect of Mutual's proposals would be to open the field to competition among the existing networks; but these proposals would buttress their positions vis-a-vis all others. Such a result, while no doubt welcome to Mutual, would hardly ensure the degree of competition which the Communications Act envisions and the public interest requires."

<sup>47</sup> An expert in broadcasting economics explained the basis for the television industry's stable noncyclical growth in advertising revenues and testified that the industry's prospects for continued growth were excellent (Tr. 3029-31). At the time of the merger agreement in December 1965, ITT's principal consultant believed

the limitations on station outlets, caused by spectrum allocations, will be overcome by the development of UHF stations, and by technological advances which bypass station limitations. This process will be encouraged if firms interested in new network entry have the financial and technological resources to cope with the present technical deficiencies of UHF and to undertake the development and promotion of the more far-reaching innovations, and if the relatively few firms with such resources remain independent of the existing broadcasting structure.

Clearly, the Commission can and should take action to enhance the potential for new entry, and, instead of assuming the inevitability of the status quo, should have appraised the present merger in the light of the desirability of promoting new entry.

***A. The Commission's Consideration of ITT's Potential Entry into Broadcasting was Invalidated by Its Erroneous Analysis of the Applicable Law on Potential Competition and the Inadequacy of Subsidiary Findings.***

The Commission's conclusion that the merger "has no probable anticompetitive effects, involving either actual or potential competition" in the national network television market (R. 5300, ¶ 18) is undermined by two distinct errors of law and cannot stand: First, the Commission has given controlling weight to the testimony of ITT's officers about its lack of intention to enter the network market independently, testimony which the courts have held to be of little probative value to resolve questions of potential competition. Second, the Commission's finding that there are many more likely entrants into network broadcasting rests on no record evidence,

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that the television advertising would already firmly support three networks, that network revenues were growing at a rate conservatively estimated at 6.5% a year (compared to recent experience of 9% a year), and that network profits were growing at 16.5% a year (J238, Roth Gerard Report, pp. 16, 18, R. 3106, 3108).

nor can it be supported by the material of which the Commission took official notice.

The facts which establish ITT as a potential entrant into network broadcasting emerge clearly from the contemporaneous documents of ITT itself. First, its officers had embarked upon a conscious, highly organized program to expand the domestic segment of ITT's business through carefully selected acquisitions. After close examination of many such industries, ITT concluded that the television broadcasting industry had "unique attraction" because of its high profitability and strong growth prospects, its "quasi-utility" character (limited access to new competitors but no rate regulation) and because it was "readily compatible with [ITT's] basic communications operations" (J182, R. 2425-7; J209, R. 2851-7; J238, pp. 2-3, R. 3044-5).

Accordingly, ITT began, several years before the ABC merger agreement, to give active and serious consideration to entering the television broadcasting business and undertook concentrated efforts to study the industry and to explore alternative methods of entry. These are summarized in the Statement, *supra*, pp. 6-7. In view of ITT's firm purpose to expand its domestic business, the many objective factors which showed television broadcasting to be a uniquely desirable industry for the company to enter and the determined measures which ITT actually took to find a suitable participation in the industry, it was a virtual certainty—not just a probability—that the company would enter the industry in some manner. If the acquisition of any of the three networks (with their owned and operated stations) was not possible, ITT would have turned to another "sizeable" and "significant" participation by acquisition of a station group, or by building a group through individual acquisitions or applications, including possible UHF entry.<sup>48</sup> This much

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<sup>48</sup> An important ITT headquarters official ordered a study of the possibility of ITT's applying for a series of station licenses for new UHF stations (Tr. 2603-4, 2621-2). Such action was also



we think to be practically beyond dispute, and the Commission's opinion concedes ITT's strong interest in entering television. (R. 5298, ¶ 14).<sup>49</sup>

ITT's acquisition of an important station group, or of a series of stations in major markets through individual acquisitions, would provide a solid basis for ITT's subsequent entry into network broadcasting. The objective criteria on which ITT's role as a potential entrant into network broadcasting may be predicated are the economic incentives that would exist after acquiring its stations and ITT's ability to respond to those incentives. It is clear that ITT would have especially strong incentive to enter networking if some of its owned stations were unaffiliated with existing networks, (as they would have to be in the nation's top markets, where the networks operate their own stations). Experience with successful independent stations in those markets shows the great incentive they have to increase earnings by originating their own programming rather than relying on old movies or the rerun series available from the existing networks; the origination of programming in effect leads to the licensing of the programs for use in other cities in order to recover some of the costs (Tr. 1679-81, 1692, 3034-7, 3077).<sup>50</sup> In

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recommended by another headquarters official, who pointed out that Kaiser was building a chain of stations by that means (J207, R. 2849)

<sup>49</sup> The FCC's further finding (¶ 14) that ITT had made some inquiries or approaches "but no determined negotiations" until the ABC transaction is plainly incorrect. Mr. Geneen and a principal assistant negotiated in late 1963 with Travelers Insurance Co. for broadcasting stations in Hartford, made an offer of \$35 million, and presented this matter to the ITT Board (Tr. 2598-2600; see J138-J143, R. 2271-2323, AR83, R. 1532-3). The uncontradicted evidence of this offer was acknowledged by ITT counsel (Tr. 4224). The record is also clear that other inquiries and negotiations were deferred until the possible acquisition of a network was explored, (J238, p. 1, R. 3043) and that such other entry was considered a clear alternative (J222, R. 2917-21).

<sup>50</sup> ABC's president referred to two such group owners who were originating and syndicating programs; he expressed the belief that they were likely entrants into networking (Tr. 1679-81). A success-



addition, ITT has special incentives to organize its own network. For example, in studying the merger with ABC, ITT was aware that its ownership of a national communications medium would confer important "ancillary benefits in the marketing area" for its commercial and manufacturing operations, as well as promote its corporate image (J232, R. 3029).

While large financial resources would be required to launch a network, ITT, once in broadcasting, would be one of the relatively few firms with sufficient resources to contemplate it. Moreover, ITT would have another important advantage. As already indicated, the development of new networks is likely to require surmounting technological obstacles—improving UHF reception in some markets, devising cable network systems in others, applying satellite technology—in order to lower costs, and to avoid the present station outlet limitations.<sup>51</sup> The company in the best position to seize the opportunity is one like ITT which has the technological resources to solve those problems.

1. *Erroneous Reliance on ITT Officials' Testimony of Company Intentions.*

The Commission's reasoning was that "there is a complete lack of any evidence that ITT at any time contem-

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ful firm thus mentioned was Metromedia, with unaffiliated stations in New York, Los Angeles and Washington. But Metromedia's total revenues in 1965 were \$89 million with net profits of only \$6,337,579. If ITT were to acquire a group like Metromedia, and it specifically evaluated it as a potential means of entry into broadcasting (J222, R. 2917-21; J227, R. 2983-4), the combination of incentives, programming experience, and financial and technological resources would become a strong potential entrant into networking.

<sup>51</sup> During the pendency of this case, an effort to establish a fourth network failed because of inadequate financial resources of the company, the high cost of transmission, and the limited affiliates obtained. See *Wall Street Journal*, June 2, 1967, p. 8. High cost of transmission was recognized by ABC's president to be one of the significant barriers to new network entry (Tr. 107). It was a substantial cause of the failure of the Dumont network in the early 1950's (Tr. 2891-2).

plated independent television network entry" (R. 5298, ¶ 15). However, this misconceives our contention, which was that ITT would have the incentives, the resources, and the technological capabilities to undertake a new network at some time after it had become the owner of local television broadcasting stations. If these contentions were well founded (the Commission has made no findings as to them), ITT would have been a potential entrant into network broadcasting irrespective of whether its management contemplated such entry as an alternative to acquisition of ABC, or contemplated that such entry would follow from acquiring local broadcast stations.

In giving controlling weight to the testimony of company officials that they never contemplated entry into network broadcasting, the Commission applied an erroneous legal standard. While holding that the competitive issues were to be judged by "criteria drawn from antitrust experience" (R. 5294, ¶ 7), the Commission ignored the principle clearly established by the Supreme Court cases for dealing with potential competition. The rule is that the status of a company as a potential competitor is to be determined not from subjective declarations of intent, but rather from the objective facts of the company's resources, capabilities, past patterns of development, and economic incentives in the particular field. *Federal Trade Commission v. Procter & Gamble Co.* 386 U.S. 568, 580-581; *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 174-175;<sup>52</sup> *United States v. El Paso Natural Gas Co.*, 376 U.S. 651.

The decision below is in direct conflict with the recent holding of the Supreme Court in *Procter & Gamble* that the absence of management intent to enter independently was not significant and that the capabilities and incentives of the company would support a finding that it was

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<sup>52</sup> The decision of the district court upon remand, 246 F. Supp. 917 (D. Del.), is pending on appeal in the Supreme Court, No. 26, this Term. The Supreme Court has noted probable jurisdiction, 386 U.S. 906.

a likely potential entrant (368 U.S. at 580).<sup>53</sup> The reason for this approach, Justice Harlan explained, is that a determination of probable anticompetitive effect must be based on analysis of industry structure rather than assurances of future conduct:

Only by focusing on market structure can we begin to formulate standards which would allow the responsible agencies to give proper consideration to mergers and allow businessmen to plan their actions with a fair degree of certainty. (Concurring opinion, 386 U.S. at 592).

Reliance upon statements of actual intent has other deficiencies, which preclude giving them serious weight. It would be relatively easy for management to supply such evidence, and difficult for court or agency to appraise it. Indeed, it is difficult for the business executives themselves to speculate as to their actual future business conduct absent the merger. As we suggested to the Commission, there have been a number of recent cases in which companies, precluded from mergers by the anti-trust laws, have independently entered markets in the face of the earlier statements of their officials that the company had no intention ever of doing so.<sup>54</sup> On the

<sup>53</sup> There was no evidence in the *Procter* case that Procter had any intention of entering the bleach business independently. *Procter & Gamble Co. v. Federal Trade Comm'n*, 358 F. 2d 74, 83 (C.A. 6), reversed 386 U.S. 568. Indeed, the company's study of the desirability of acquiring Clorox (FTC Ex. 324) had recommended against independent entry.

<sup>54</sup> For example, in 1958, Bethlehem Steel sought to justify a merger with Youngstown Sheet and Tube Company in part on the ground that the merger was necessary to enable Bethlehem to enter the midwest market. Bethlehem also asserted that construction of its own plant in the Chicago area was not economically feasible. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 616 (S.D.N.Y. 1958). After the merger was enjoined, however, Bethlehem went ahead and built a large modern plant in the Chicago area. (See Moody's *Industrial Manual*, June 1966, p. 2861, see also testimony of Assistant Attorney General Orrick in Hearings on Economic Concentration, before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th

basis of the properly applicable criteria, ITT's potential activities in broadcasting, absent the merger, should be appraised without giving significant weight to testimony of officials' intent; the effect of the merger in eliminating such activities was a significant adverse effect upon competition.

2. *Erroneous Reliance on the Alleged Number of Other Potential Entrants*

The Commission's second response to our argument that ITT, as the owner of a group of stations, would have been a likely potential entrant into networking was the following (R. 5298, ¶ 16):

It is known to the Commission both from its own records and publications of which it takes official notice, that there are substantially more than 100 so-called "group owners" of television stations, many of which are companies of various substantial resources, some exceeding those of ITT, and which would be, by this test, "likely potential entrants into networking."

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Cong., 1st Sess., Part 2, p. 813). In 1964, the Humble Oil and Refining Company urged that its entry into gasoline marketing on the west coast could be accomplished only through the acquisition of Tidewater Oil Company. After the merger was prevented, *United States v. Standard Oil Co.*, Civil No. 64-490 (S.D. Calif.), Humble went ahead independently and is now in the midst of a vigorous program of expansion. And more recently, Standard Oil Company of New Jersey sought to justify its acquisition of the Potash Company of America on the ground that notwithstanding its capability and interest in entering the potash field by internal expansion, independent entry was not likely because the field did not meet the company's "guide line . . . return on investment" for new projects. The district court enjoined the merger, nevertheless, pointing out that the same factors which motivated the firm to enter by acquisition would also be motivating factors for independent entry, and finding that, absent the merger, Standard Oil would be a potential entrant. *United States v. Standard Oil Co. (New Jersey)*, 253 F. Supp. 196, 220-223, 227 (D. N.J. 1966). Since that time, Standard Oil has apparently taken the first steps toward such independent entry. *Wall Street Journal*, April 7, 1967, p. 15.

Then, "without suggesting any inference as to their competitive intention or status" (§ 16) the Commission went on to list the names of some 16 group owners. These findings of the Commission are, on their face, totally inadequate to establish that there is no anti-competitive consequence in the loss of ITT as a potential entrant into network broadcasting. We do not dispute the Commission's right to take official notice of the fact that there are 100 or more group broadcasters—i.e., owning two or more stations. But this fact standing alone, is wholly inadequate as a basis for making any rational assessment of the anticompetitive effect of eliminating ITT as a potential entrant. A "group owner" may well be a small company holding licenses for two television stations in minor markets;<sup>55</sup> and no one could contend that such a company is a significant potential entrant into network broadcasting. While the Commission goes on to list some of the largest group broadcasters, it expressly states that it is making no judgment about their "competitive status." But it is precisely this issue which is critical in determining the significance of the loss of ITT as a potential entrant. Any meaningful assessment of the relative importance of ITT as a potential entrant would require a careful comparison of the competitive status of other alleged potential entrants with ITT—i.e., the resources, capabilities and incentives of those firms.

Although the Commission expressed the intention not to pass upon the competitive status of any particular group broadcaster, in self-contradiction it draws the conclusion that ITT was not "even among the dozen or more most likely entrants" into the television network market (R. 5299, § 17). The record is devoid of findings or factual support for this conclusion. On the contrary, the col-

<sup>55</sup> For example; *Television Factbook*, 1967 ed., pp. 109a-114a includes the following as "group owners": Black Hawk Broadcasting Co. owning stations in Waterloo-Cedar Rapids and Austin, Minn.; Community Broadcasting Service, owning stations in Bangor and Presque Island, Maine; Mid-America Television Co., owning stations in Jefferson City, Mo. and Peoria, Ill.

location of attributes making for potential entry by ITT is, on its face, unique. Even if it were proper for the Commission to rely upon official notice for an adjudicative fact of such critical significance (see 2 Davis, *Administrative Law Treatise*, ¶ 15.10), it cannot do so without making clear "the particular or evidential facts on which it rested its conclusion. Not only are the facts [upon which the Commission relied] unknown; there is no way to find them out." (*Ohio Bell Tel. Co. v. Public Utilities Commission*, 301 U.S. 292, 302; *ICC v. L & N.R.R. Co.*, 227 U.S. 88, 93; 5 U.S.C. 556 (e)). The Commission does not suggest, and we are not aware of, anything in the records of its prior proceedings or in standard industry reference works which would provide a factual basis for its conclusion.

We think it clear, moreover, that the conclusion cannot be defended as being a matter of Commission expertise and therefore immune from the ordinary requirement of specific evidentiary support. In areas far more closely related to the Commission's central responsibilities, such as the electrical-interference consequences of granting an additional license or the nature of the programming needs of a particular community, this Court has repeatedly held that "Commission expertise alone cannot support pivotal assumptions."<sup>56</sup> As the Supreme Court has said, "expertise is not sufficient by itself. Findings supported by substantial evidence are required." *Interstate Commerce Commission v. J-T Transport*, 368 U.S. 81, 93.

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<sup>56</sup> *Harrell v. FCC*, 105 U.S. App. D.C. 352, 267 F. 2d 629; *Easton Pub. Co. v. FCC*, 85 U.S. App. D.C. 33, 175 F. 2d 344; *Plains Radio Broadcasting Co. v. FCC*, 85 U.S. App. D.C. 48, 51-52, 175 F. 2d 359, 362-363. As Chief Judge Stephens explained "The 'expertise' of a Commission usually serves it in evaluating the evidence but that expertise can not supply evidence and can not, without findings made upon the critical issues before it, guide a commission to a rational and lawful decision." (*Capital Transit Co. v. Public Utilities Commission*, 93 U.S. App. D.C. 194, 205, 213 F. 2d 176, 187, certiorari denied, 348 U.S. 816).

***B. The Commission's Consideration of ITT's Potential Activity in CATV and Pay-TV Was Legally Erroneous***

CATV and the closely-related concept of a pay-TV cable system are among the most important potential developments which would multiply the channels of broadcast transmission, and provide competitive alternatives to the existing structure of broadcasting. If local CATV systems bring in non-network programs from distant areas or originate their own programming, they will offer significant competition to the local, network-affiliated broadcasting stations. Moreover, development of economic methods of interconnecting local CATV systems into regional or national CATV grids would have an especially significant competitive impact. It would facilitate the entry of new companies into the large-scale production and distribution of programming in a manner similar to and competitive with conventional network television. Pay-TV, moreover, offers the prospect of a method for financing programming by viewer choice, which would be a radical alternative to advertiser sponsorship. These developments are frankly conceded by the existing networks to be a major competitive threat. ABC, for example, has opposed any substantial growth of CATV in metropolitan areas and has opposed pay-TV. It has given notice that, if these developments are permitted at all, it intends to exert efforts to shape them in a manner beneficial to existing ABC interests (J38, Appendix III, p. 9, R. 1726).<sup>57</sup>

<sup>57</sup> In filings to the Commission, ABC has asserted that "unregulated CATV" would be a competitive threat to the existing broadcasting industry. It has warned of the dangers of CATV systems spreading to interconnect "most if not all of the country" and of the possible development into pay TV. It has attacked "the multiplicity of additional signals brought in via CATV" and has sought regulatory policies to limit CATV operations and to give TV broadcasters a "preference" for CATV franchises. See Petition of ABC for Commission Regulation of the Carriage of Television Signals by Community Antenna Television Systems, October 16, 1964, pp. 3-8, in FCC Docket No. 15971.

Pay-TV would also conflict with the economic interests of ABC



The Department contended that the merger, by giving ITT a large financial stake in the existing broadcast structure, would eliminate its incentive to participate actively in the full range of CATV and pay-TV development. That ITT was in a position to be one of the leading forces in their field is established, we think indisputably, by the record evidence (including an abundance of contemporaneous ITT documents) of what it was in fact doing shortly before the merger agreement. In mid-1965 ITT, through its Federal Electric Corporation subsidiary, was engaged in what it described as a "full-scale" CATV effort (J119, General Overview, p. 1, R. 2139). It committed \$10 million to this effort, and expected an equal or greater expenditure to follow in the first half of 1966. It undertook to construct six sizable systems which it effectively controlled, and which it has since taken over responsibility for operating. It employed a number of consultants, and considered more than 80 different opportunities for developing or acquiring CATV systems (J60-137, R. 1880-2270).

ITT management also discussed with considerable interest the prospect of a "Common Carrier Microwave System cover[ing] the United States, independent of the Bell System, to interconnect the grid of CATV cable systems" (J119, p. 23, R. 2161). It expressed "consummate interest in acquiring interconnecting communications carriers" and was undertaking a study of such opportunities for "acquisition and/or development" throughout the country (J122, p. 4, 2182; J132, p. 2, R. 2228).<sup>58</sup>

as owner and operator of some 400 motion picture theatres, the largest chain of theatres in the country (see J317, R. 3722; J238, Kuhn, Loeb Report, pp. 6-7, R. 3069-70). Motion picture exhibitors spearheaded the referendum in California barring use of the Skiatron-Subscription TV pay-TV system (Tr. 3144).

<sup>58</sup> The Commission erroneously states that alleged ITT interest in a CATV grid or network rests upon a June 1965 ITT staff "think piece" (R. 5302, ¶ 26); on the contrary, that report (J119) was followed by discussion and investigation at the personal direction of ITT president Geneen in October and November 1965. Mr. Geneen so directed because he found the "interconnecting communi-



Company officials were aware of the close relationship between "a transmission grid of CATV" and the potential of pay-TV which was belived to be only three to five years away (J119, p. 23, R. 2161). They planned their CATV systems to permit ready conversion to pay-TV "with a minimum of cost and a minimum of fanfare" (J119, p. 23, R. 2161), looked into pay-TV projects in Puerto Rico and elsewhere, had lengthy meetings with two firms prominent in the development of cable systems of pay-TV, made studies of the possibility of investing in those firms (at least one of which was favorable), and undertook tests and technical analyses of their equipment (J119, p. 7, R. 2145; J302-J309, R. 3693-3709; Tr. 859, 977-8, 3150, 3165-6).

These avenues were plainly seen to be appropriate applications of the companies' background and great resources in the communications technology and communications carrier fields. And, while ITT decided after the ABC merger agreement in December 1965 to put off further expansion into CATV and pay-TV, the staff responsible for ITT's CATV operations currently recommends expansion of several of ITT's CATV systems, and the incorporation of increased programming origination capability in some of these systems (J363, pp. 22, 24, 55, R. 4246, 4248, 4279). It recognizes, however, that one of the reasons against ITT's continuing in the CATV business is the possible "[c]onflict with broadcasting operations" (J363, p. 5, R. 4229), and ITT headquarters management has not yet passed on these recommendations (Tr. 1002).

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cations carrier" role a "very interesting field in the sense of giving a key position in relation to any later advertising" and of putting ITT "in a position of representing in the marketing field CATV operations that we do not own" (J134, p. 1, R. 2232; J74, last page, R. 2038). He also expressed the view on November 1, 1965, that "The CATV field is one of the most rapidly growing and, by many evidences, one of the most potentially prosperous for the future that we could look into" (J74, R. 2034) and his report to the Board on November 10, 1965, obtained approval of an authorized investment of \$10 million (AR83, R. 1542-3).

The record thus demonstrates forcefully ITT's resources and incentive to make a substantial contribution in the CATV and related field. The record also establishes, and indeed ITT does not dispute, that a company owning one of the three existing networks would have economic interests inconsistent with the fullest promotion of the technological possibilities of CATV and pay-TV. The Commission nevertheless finds no significant adverse effect from the merger (at most a "slight" detriment) on the ground that (1) ITT's decision to defer or terminate expansion in these fields was unrelated to the merger; (2) there are "very fundamental policy obstacles" standing in the way of the development of CATV or pay-TV in directions competitive with the existing broadcasting structure; and (3) there are many other firms ready and able to pursue the development as fast as regulatory policy permits. We submit, however, that there are serious flaws in each of these three conclusions.

1. *Erroneous Reliance on Testimony of ITT Officials Regarding the Company Decision in January 1966*

The evidence as to ITT's decision to terminate or defer expansion into CATV and pay-TV in November 1965-January 1966 is conflicting.

On the one hand, the relevance of the ABC merger was acknowledged in the contemporaneous documents. The merger agreement was reached during a temporary freeze on ITT's CATV activity when criteria for new projects were tightened pending further internal review (Tr. 1391-2, 1784-5). While ITT officials recognized economic and legal problems in CATV, they continued their interest and investigation into the field, which its president thought to be "one of the most rapidly growing and . . . one of the most potentially prosperous for the future that we could look into" (J74, R. 2034).<sup>50</sup> On December 28,

<sup>50</sup> In the period after the "freeze" was imposed on November 2, 1965, ITT continued to study, analyze and seek out new CATV opportunities, and included them in weekly reports to ITT head-

1965, the headquarters staff official in charge of that review advised Mr. Geneen (J126, R. 2203, 2205):

We have not yet been able to satisfy ourselves on a go or no go decision. We expect to do this within the next two weeks. . . . We are aware of the need of cooperation with ABC and plan to work out the details as soon as our internal planning has been completed. We also plan to request their audit of our decision to go or no go.

The subject of ITT's CATV plans and the effect of the ABC merger came up before a meeting of ITT officials comprising a CATV committee on January 5, 1966,<sup>60</sup> and the decision was then reached that ITT would "stay at the status we had" (Tr. 990) and that "we should not go forward," "at least not at that time" (Tr. 984, 987). A leading figure in pay-TV, with whom ITT officials had held a four-hour meeting on November 17, 1965, recorded a conversation in December with the Acting Manager of ITT Federal Electric's CATV Division in which apologies were expressed for cutting off discussions as a result of the ABC merger (J317, R. 3722).

On the other hand, ITT officials involved in these fields testified to the Commission concerning their own views

quarters during November and December 1965 (J75, R. 2034-8; J76, R. 2044-6; J78, R. 2049-51; J129, R. 2214-7; J132, R. 2226-8); ITT continued the employment of Philip Gibson as special consultant in CATV projects and, indeed, renewed his contract in January (J362, R. 4198); Mr. Geneen reported on CATV to a November 10, 1965 ITT board meeting and the minutes indicate approval of a \$10 million expenditure, without any reference to a decision not to engage in any further CATV activity (AR83, R. 1542-3); ITT headquarters and Federal Electric officials spent a great deal of time drafting a set of criteria by which to evaluate prospects for acquisition or development (J78, R. 2049-51; J80, R. 2054-6; J77, R. 2047-8; J133, R. 2229-31; J364, R. 4292-4302), and a study was made of the appropriate division of responsibilities for further CATV projects among ITT companies (J79, R. 2052-3).

<sup>60</sup> The agenda for this meeting included the following items: "VI Go/No Go recommendation relative to FEC coming out of 'freeze' will be made by CATV committee," and "VII Discussion relative to ABC impact on ITT CATV mission" (J77, R. 2048; J80, R. 2055).

and attitudes at the time and sought to explain the documents above cited. Thus, they described some of the obstacles and disadvantages in CATV and pay-TV (Tr. 920-1, 952, 982, 1783-4); they declared a personal lack of interest in those fields (Tr. 856-7, 933, 991); they explained the proposed ABC "audit" of ITT's CATV program as something intended to occur after merger because of ABC's expertise; and they asserted that no discussions with ABC actually occurred (Tr. 890-4, 969-71, 986-7, 1801, 1809-10). The Commission's conclusion that ITT's CATV and pay-TV decisions in November 1965-January 1966 were made "independently as business judgments" rested upon its complete and unqualified acceptance of the testimony of these ITT officials (R. 5303, ¶ 27).

We submit that the Commission's conclusion is erroneous for two reasons. First, the Commission has not provided any explanation or reasoning for its acceptance of the self-serving statements of the ITT officials in the face of conflicting testimony and contemporaneous documents.<sup>61</sup> The Commission in this case omitted the inter-

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<sup>61</sup> Thus, the witness' disclaimer of interest in CATV and pay-TV is in direct conflict with the contemporaneous evidence of reports, negotiations and other activities, and with the testimony of the president of Skiatron, a leading pay-TV firm, about the "enthusiastic" attitude of ITT officials (Tr. 3147). The Commission's Broadcast Bureau concluded that ITT's interest in CATV and pay-TV was "active and comprehensive" and that the "disclaimer of interest in Skiatron" by Federal Electric's president "cannot be accepted because it is contrary to the specific facts" as to ITT's activities and investigations (Broadcast Bureau Proposed Findings 52, 56). The ITT officials' explanation of the ABC "audit" document conflicts with the fact that the merger was at the least months away from consummation, while a go/no go decision was promised "within two weeks", and with the fact that ABC had no experience in CATV. The testimony about reaching a "go/no go decision" without reference to ABC also conflicts with the agenda for the meeting at which this was done. And the testimony that ITT is making efforts to dispose of its CATV interests (Tr. 1008-9), accepted by the Commission (R. 5301, ¶ 21), is contrary to ITT's February 1967 report (J363, R. 4232, 4245, 4250, 4268, 4285).

mediate decision of the hearing examiner and thus has not had the benefit of an appraisal of witness demeanor by the officer who actually heard the testimony. It was obliged to set forth the basis for its judgment that the ITT testimony was controlling, in order for the Court to perform its statutory review function (Cases, p. 16, *supra*).<sup>62</sup>

Second, in any event, the Commission's effort to retrace the details of a particular ITT management decision more than two years ago falls into the same error which we discussed above, in analyzing ITT as a potential entrant into broadcasting. The status of ITT as a potential competitor in CATV and pay-TV, absent this merger, cannot be ascertained by findings as to the feelings of particular ITT officials either two years ago or now. The Commission recognizes that ITT might reverse its policy "at some future time" (R. 5303, ¶ 27) but it neglects to point out that even now ITT's CATV staff recommends expanding the company's efforts, although recognizing conflict with ABC as a reason not to do so (J363, p. 5, R. 4229). In the long run, the feelings and views of corporate officials at a particular time are not reliable guides to measure potential competition. (A particular corporate decision, moreover, is affected by transitory elements such as alternative investment opportunities and litigation problems). What is required, but absent here, is an analysis based on such objective factors as the resources, capabilities, and incentives of ITT in the CATV-

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<sup>62</sup> While agency findings on conflicting evidence are entitled to deference even if it did not actually hear the testimony (*FCC v. Allentown Broadcasting Co.*, 349 U.S. 358), a conflicting examiner's decision is given weight in determining whether the agency's opinion is supported by substantial evidence on the record as a whole (*Universal Camera v. N.L.R.B.*, 340 U.S. 474, 492-497; *In re United Corp.*, 249 F.2d 168, 179 (C.A. 3)). The conflict on this record likewise calls for an explanation. Note that in dealing with a similar situation, of contemporaneous documents and self-serving testimony explaining away the documents, the Supreme Court has indicated that the testimony ordinarily is entitled to little weight. *United States v. United States Gypsum Co.*, 333 U.S. 364, 396.

pay-TV field. An analysis of those factors plainly shows that ITT was a very important potential entrant into this field, absent the merger.

## 2. *Erroneous Reliance on Current Regulatory Policy*

The Commission noted that any development of CATV to the point where it threatened significant new competition to existing television networks would run counter to the Commission's present policy on CATV and the rules promulgated thereunder (FCC, Second Report and Order, 2 FCC 2d 725; 47 C.F.R. 74.1107). In the Commission's view (R. 5302-3, ¶¶ 26-27), this fact rendered "speculative" any adverse effect upon the public interest resulting from the loss of ITT's independent activity in CATV and pay-TV. We submit that this is error as a matter of law. In antitrust cases dealing with regulated industries, it has been definitively established that the existence of regulatory review does not eliminate the competitive importance of preserving aggressive independent factors (*United States v. El Paso Natural Gas Co.*, 376 U.S. 651; *Georgia v. Pa. R.R.*, 324 U.S. 439; cf. *United States v. Philadelphia National Bank*, 374 U.S. 321, 352, 371-372).

The reason for this policy lies in the importance of preserving a climate in which all options will be presented to the Commission by persons having economic incentives to pursue them vigorously. Thus, in *El Paso*, the fact that a natural gas company could not enter the California market without an FPC certificate did not preclude a holding that a merger eliminating an important potential applicant violated Section 7 of the Clayton Act. And this did not depend upon a prediction that the acquired company would obtain a certificate; "[U]nsuccessful bidders are no less competitors than the successful one" (376 U.S. at 661). The same is true of a potential competitor who may need modification of current regulatory policy before he can become an actual competitor. There is, in short, a significant competitive value in pre-

serving a situation in which there will be aggressive independent voices urging the Commission to grant the needed authority and to reverse its policy.

The need for vigorous companies with strong economic incentive to urge changes in existing regulatory policy is especially evident in the fields of CATV and pay-TV, in which the present situation is obviously tentative and open to change. The uncertain state of affairs is exemplified by pending litigation as to the Commission's authority to restrict CATV expansion and as to the impact of copyright upon CATV.<sup>63</sup> Indeed, the Commission's own Second Report and Order on CATV, cited below, stressed the flexible, preliminary nature of the regulation which now prevents development of CATV grids or networks. It stated that the Commission is "not committed to the status quo" and foresaw the possibility of allowing "full unfettered growth" of CATV.<sup>64</sup>

A further striking example is provided in pay-TV. In cross-examining the president of Skiatron, ITT counsel sought to bring out the futility of the witness' efforts to obtain Commission approval for extensive pay-TV operations (Tr. 3201). Since the decision in this case, how-

<sup>63</sup> See with respect to the Commission's authority, e.g., *Buckeye Cablevision, Inc. v. FCC* (C.A.D.C. No. 20,274, decided June 30, 1967); *Southwestern Cable Co. v. FCC* (C.A. 9), petition for writ of certiorari pending, No. 363 this Term. See, with respect to copyright, *Fortnightly Corp. v. United Artists*, (C.A. 2) (1967 CCH Trade Cases ¶ 72,131), petition for writ of certiorari pending, No. 618 this Term.

<sup>64</sup> 2 FCC 2d at 788-789. The Commission's full statement was as follows: "[W]e are not committed to the status quo—to protecting existing investment against new technological advances. The whole history of this art has been one of great change, from radio to television to perhaps tomorrow satellite broadcasting or laser communication. It may be that CATV, if allowed full unfettered growth, would prove to be an excellent supplement, bringing additional service and diverse programming to millions of people in built-up areas who can afford it, without detriment to the provision of additional local broadcasting service to the entire Nation. If so, the information obtained in the hearing process will provide that indication, and will be the basis for authorizing such growth".



ever, a special committee of the Commission (consisting of three commissioners) has recommended that regular services of over-the-air pay-TV be permitted under certain conditions. See F.C.C. Report of Subscription Television Committee in Docket No. 11279, July 14, 1967.

The Commission may accept or reject these or other recommendations, but plainly it cannot alone create successful pay-TV systems or CATV networks. Nor can it effectively pose all the alternatives. Experience shows that it is essential to the regulatory process for there to be organizations and companies, motivated by strong economic incentives, to pose the alternatives and to promote them. The uncertainty of the current policies on CATV and pay-TV is not a basis for discounting potential competition, but rather demonstrates its importance. The Commission erred, therefore, in attaching minimal importance to the safeguarding of future regulatory options, and thereby dismissing the effect of the merger in eliminating ITT as a substantial potential factor in CATV and related fields.

### 3. *Erroneous Reliance on the Number of Other Companies in CATV*

As it did with respect to the issue of ITT's potential competition in broadcasting, the Commission has found, based on its own knowledge and facts taken from "standard trade publications", that "there are hundreds of companies engaged in the CATV business, including a number with resources comparable to those of ITT", and that numerous companies in CATV "are ready, willing and able" to expand as fast and as far as permitted (R. 5302, ¶ 26). For the reasons set forth above, pp. 58-60, such purported findings are inadequate.

The burden was upon the applicants to prove that other firms in the CATV field are comparable to ITT, which could (and planned to) bring to bear its background and experience in communications technology and in communications carriage. Applicants failed to introduce any



evidence on this point. In its proposed findings it sought to fill the gap by naming three alleged "substantial companies" in constructing local cable systems (Applicants' Proposed Finding 9.0); but published statistics showed that these firms were insignificant compared to ITT.<sup>65</sup> CATV owners include a wide range of firms in terms of their sizes and principal areas of interest.<sup>65a</sup> The critical issue, again, involves the capabilities, resources and incentives of these firms, and their comparison with ITT.

The Commission does not list the firms and does not specify the nature of the information in its records or in the publications of which it takes notice which would be pertinent to these critical issues. We are not aware of the existence of such information upon which it might have relied. In any event, the Commission was obliged to make adequate findings as to the identity and character of the comparable firms. The failure to do so invalidates the "bare conclusion"<sup>66</sup> that there are so many comparable firms that eliminating ITT's potential efforts is not a significant adverse effect of the merger.

<sup>65</sup> The companies cited by applicants were Jerrold Corporation, Ameco and Entron, Inc. We cited to the Commission, from Moody's *Industrial Manual*, June 1966, pp. 542, 1610, 1978, the 1965 figures for the sales and profits of those three companies. Their revenues were about \$30 million, \$10 million, \$2¼ million, respectively, and the combined total profits of these allegedly "substantial" companies were \$1,233,759, slightly more than one-half of one percent of ITT's R&D expenditures of \$200 million. Certainly these companies could hardly contemplate expanding CATV operations by \$10 million in six months as did ITT (J119, Synopsis, R. 2137).

<sup>65a</sup> Applicants' listing of CATV owners included broadcasters, publishers and others. See Applicants' Proposed Finding 8.20, discussed in the Department's Brief below, pp. 29-31. Only General Electric appeared comparable, and it lacked ITT's background as a communications carrier, which led ITT to contemplate CATV grids.

<sup>66</sup> *Telanserphone, Inc. v. F.C.C.*, 97 U.S. App. D.C. 398, 401, 231 F.2d 732, 735.

***C. The Commission's Consideration of ITT's Potential Activity in Developing New Forms of Broadcast Transmission by Advanced Communications Technology was Legally Erroneous***

The record of this case makes clear that there are now on the verge of technological feasibility a number of developments which would multiply the channels of access to the public, and thereby lead to more competition and more diversity in broadcasting. Dr. Charyk, president of Comsat, testified that it would be possible to have a communications system based on a combination of satellites and metropolitan networks (using cable, microwave and laser) with coaxial cable of very large channel capacity leading to the homes. In such a system, television broadcasts (and other electronic signals) would be beamed to a satellite, which would in turn relay the signals to a ground station for transmission within a metropolitan network to the home (J339, pp. 2-3, R. 3839-40). He also discussed the technical feasibility within a few years of direct satellite-to-home broadcasting (J339, p. 3, R. 3840). (See also the descriptions by Dr. Hill of MIT, J334, att. pp. 194-7, R. 3814-15). These advances would enable broadcasting to develop free of the spectrum limitations on station outlets which are now the source of network scarcity and economic power. It is also clear that there is not now a well-known body of art capable of achieving these and other developments on an efficient and economical scale, and they will require substantial innovative effort and investment of technological resources. The actual realization of such advances, and the pace at which they will be developed and introduced, Dr. Charyk testified, will turn on "a variety of factors, including competition, economic cost and profitability, incentives to innovate, and resistance to change engendered by the present structure of telecommunications and broadcasting" (J339, p. 3, R. 3840).

We urged to the Commission that this merger would have a significant adverse effect because of its impact

upon the last two factors. The fact that the merger foreclosed ITT's independent entry into broadcasting, and its expansion into CATV and pay-TV, removed a strong economic incentive which ITT would have had to employ its technological resources to reduce costs and increase efficiency in those areas, that is, in UHF and cable networks.<sup>67</sup> But the proposed merger has more serious detrimental effects. It will make ITT part of the "present structure of . . . broadcasting" and create the strongest disincentive with respect to innovations which would adversely affect its half-billion-dollar investment in the status quo of that industry.

These effects upon ITT's interests and incentives are confirmed by the evidence that ITT's engineers and scientists are expected to, and do, look at the overall economic benefit to the ITT "family" from their work, that this appraisal is one aspect of the centralized control by ITT headquarters over all the company's research and development, and that, after the merger, this assessment of overall economic benefit would include impact on ABC (Tr. 166, 1433-4, 1844, 2873).<sup>68</sup> Mr. Geneen has conceded that the impact on ABC of something like satellite-to-home broadcasting would be "harmful" (Tr. 1857). The adverse effects are also confirmed by the expert testimony of Dr. Hill of MIT, who stated that the existing industry "does not have a real incentive to change its technological structure" by developments such as those "which would increase the number of channels of access to the audience", and that only very small improvements are to be expected of it as in components and techniques (J334, pp. 1-2, R. 3811-2; Tr. 1731). Dr. Hill expressed the view that ITT-ABC would be "another large communica-

<sup>67</sup> The Commission's conclusion that the merger will result in benefits to UHF technology has been dealt with in Point II, *supra*.

<sup>68</sup> Indeed, ABC would be ITT's largest single source of revenues and earnings, "far more important" than any other subsidiary or division. It would be so important, Mr. Geneen said, that ITT would have "no conceivable reason for taking any action which might jeopardize the interests of ABC" (Tr. 176, 348, 544; ITT Ex. 12a, R-32, pp. 5, 10).

tions-broadcasting firm" and there is no evidence that its incentives would differ from those of others in the industry (J334, p. 2, R. 3812).

Furthermore, there is no question on this record that an adverse impact upon ITT's incentive is a significant detriment, because of the important position which it occupies among the few companies presently able to contribute to fundamental technological advances in communications. The uncontradicted testimony of expert witnesses is emphatic on this point. Dr. Charyk ranked ITT among the top five companies in satellite communications (J339, pp. 1-2, R. 3838-9). An expert, Mr. Bogdan Stack, of Stanford Research Institute, ranked ITT among the three leading United States communications technology firms (along with AT&T and General Telephone & Electronics) in overall communications systems capabilities, including the design, manufacture, and operation of communications systems. Considering ITT's overseas operations, it was characterized as being "in the unique position" of having the proved capability of designating and installing such systems throughout the world (J337, p. 3, R. 3833).<sup>69</sup>

The adverse effect is by no means ameliorated by the fact that another network (NBC), is part of another leading firm in communications technology. The number of leading firms in this field is sufficiently small that furthering similar affiliations of the other networks (and a merger by CBS is apparently viewed by the Commission

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<sup>69</sup> ITT claims to be a "great communications company" which is "a major force in the spectacular technological advance of this country and the world" (R-1, Ex. I-4, 1965 ITT Annual Report, p. 7; see J206, R. 2808-45; J262, p. 5, R. 3366; J277, R. 3854-8). It has received about 20% of all Comsat procurement of equipment and services for satellites and earth stations (J336, R. 3823-30). The Commission states that ITT "is a large company with extensive resources in some fields of communications technology including satellite communications," that ITT "engages in extensive research and development" in telecommunications, and that ITT "is one of the principal contractors with and suppliers to Comsat" (R. 5303, ¶ 30).

without trepidation, *supra*, p. 38) would have aggravating consequences. As Dr. Hill stated, "To maintain a flexible situation most conducive to technological change in this field, there is a substantial advantage in establishing and maintaining important sources of technology which are separate from interests in the present broadcasting industry structure" (J334, p. 2, R. 3812). This point was also emphasized by the testimony of a high official of Hughes Aircraft Company, whose experience with developing and promoting the synchronous communications satellite led him to the conclusion that it was important to keep substantial communications users separate from technology firms in order to enhance the incentive for advanced research and development, such as would "lower technological barriers" in the television field (J338, p. 1, R. 3836).

The history of satellite development shows, moreover, that the merger will have another adverse effect, apart from the impact upon ITT's incentives. While ABC's interests are opposed to technological developments which would increase the number of network competitors, it has an interest in reducing its own costs as a user of communications services. Hughes' recognition of that fact led to its approach to ABC, and to the latter's sponsorship of the Hughes synchronous satellite; and Hughes does not believe it practical to work with ABC after the merger (J338, R. 3836-7).<sup>70</sup> Thus, the merger, by removing ABC

<sup>70</sup> As testified by Mr. Visher, Assistant Manager of Hughes' Space Systems Division, after Hughes developed the synchronous communications satellite and was unsuccessful in selling it to Comsat, it sought out a large user of the type of services a satellite system would provide, in order to advance the proposal. It therefore approached ABC, and the result was the first proposal for a domestic satellite system for TV transmission services. Hughes would not have felt it wise or potentially fruitful to approach ABC if it had been merged with ITT, and its interest in maintaining a working relationship with ABC was substantially reduced by the announcement of the merger (J338, R. 3836-7).

As noted in Point IV-B *infra*, ABC's pursuit of its interest in lowering its own transmission costs can redound to the benefit of other entrants, if the ultimate result is lower cost services for all users.

as a significant customer or sponsor of those developments which are in the network's interest, may adversely affect the incentives of other technology firms. This would further reduce the flexibility conducive to technological change of which Dr. Hill testified.

The Commission's response was that (1) technological advances have come from large companies with broadcasting interests; (2) fundamental technological changes will require policy decisions by Congress and the Commission; and (3) ITT is only one of many companies capable of making contributions in technology. We submit that these grounds were inadequate to dismiss the detrimental consequence, and that they lacked essential subsidiary findings.

1. *Erroneous Reliance on Technological Advances by Broadcasting Interests*

Although the holding is not explicit, the Commission's statement that "most of the important work and significant technological advances have been the product of large companies with broadcasting interests, of which RCA has been the foremost" (R. 5304, ¶ 33), appears to suggest that ITT's acquiring a heavy economic interest in an existing network would not deter its research and development work in directions contrary to the network's interests. The Commission's analysis is contrary to the record evidence above cited; it is also patently unsound and, indeed, self-contradictory. Elsewhere, the Commission recognizes that the entry of a company into an industry will give it incentive to engage in technological development calculated to improve its competitive position in the industry, but it declines to recognize that there are disincentives as well—that a company is less likely to pursue research and development, and engage in active promotion of innovations which greatly impair its competitive position, or the value of its investment, in an industry.

To be sure, ITT has stated that it intends to continue its research in these frontier areas of technology since it must keep up with its competitors. But this is far from being a complete answer for at least two reasons. First, there is a great deal of difference between keeping up in research and undertaking ambitious and imaginative pioneer programs. This is demonstrated by the history of the radio and television industry to which the Commission referred. RCA has unquestionably been a pioneer in many important radio and television developments, but neither the study cited by the FCC nor anything in this record suggests that RCA has ever engaged in the active pioneering and promoting of innovations calculated to effect adversely its existing interests. For example, it is widely recognized that RCA has been vigorous in the development and promotion of compatible color television, but this was impelled by its concurrent interests in advancing the sale of receiving sets and equipment and in enhancing its position in broadcasting.<sup>71</sup> On the other hand, it is also recognized that RCA has no similar incentive actively to promote the development of UHF broadcasting because of the adverse impact which it would have on the NBC network. Quite plainly, this was Mr. Goldenson's evaluation when he testified that ABC would not expect RCA to be a sympathetic listener if UHF technical work were requested by ABC (Tr. 275-7, 314). As Commissioner Loevinger indicated at the time of argument (Tr. 3990; see also J334, pp. 1-2, R. 3811-2), there has been very little basic technological development in television since the 1940's, and it is during this intervening period that television has become a highly profitable industry and that the limitation upon the number of channels has assumed great value to the owners of existing stations and networks.

<sup>71</sup> RCA's successful efforts, indeed, were dramatic confirmation of Mr. Justice Frankfurter's prediction, in the case dealing with the FCC's earlier color television standards: "Especially when the incentive is great, invention can rapidly upset prevailing opinions of feasibility." *RCA v. United States*, 341 U.S. 412, 427.



Second, both antitrust decisions and formulation of communications policy have been premised upon the principle which we have discussed in connection with other aspects of potential competitive behavior, that, in the long run, analysis of industry structure and natural economic incentives is a far more reliable basis upon which to make findings about the advancing or retarding of technology, than are statements of intention. Thus, in *United States v. Continental Can Co.*, 378 U.S. 441, 464-465, the Court rejected the contention that a merger of a can-manufacturing firm and a glass-container firm did not affect the innovation activity of either, and the Court said:

- It would make little sense for one entity within the Continental empire to be busily engaged in persuading the public of metal's superiority over glass for a given end use, while the other is making plans to increase the Nation's total glass container output for the same end use.

This principle also played an important role in the Congressional formulation of the Communications Satellite Act. It was the basis for the proposal that ownership of the system should be "as broadly based as possible." The Administration bill rested upon the belief "that a limitation of ownership and participation to existing communications carriers will retard development of the systems." The basic assumption was that:

There would be a natural reluctance on the part of companies with large investments in existing facilities to take speedy action which would make these facilities obsolete. . . .

[N]ew developments and improvements in the system would be considered from the viewpoint of their effect on existing facilities. . . .

A truly independent company would have no such problem which could delay the establishment and expansion of the satellite system and which could re-



tard research and development and the utilization of new developments.<sup>72</sup>

Moreover, the impact on economic incentives and disincentives was recognized by ITT when it urged that it would tend not to use the satellite system—because of the impact upon its existing investment in cables—unless it was given a share of ownership in the system.<sup>73</sup>

## 2. *Erroneous Reliance on Regulatory Policy*

For the reasons stated earlier with respect to the CATV issue, the Commission was clearly in error in suggesting that the elimination of ITT as the promoter of

<sup>72</sup> Hearings on Antitrust Problems of the Space Satellite Communications System before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 87th Cong., 2d Sess., April 4, 1962, pp. 141, 143-144; see also p. 151. (Testimony of Assistant Attorney General Loevinger). At the latter pages, Assistant Attorney General Loevinger was addressing himself principally to the likely effect upon technological advances in the satellite field if the Satellite Corporation were to be controlled by AT&T. He gave "examples of the conflict of interest that could arise in a corporation controlled by AT&T" pointing out that such a company "could scarcely avoid considering the effect of satellite facilities on existing investments in cable facilities" (p. 143). He also referred to examples of situations in which AT&T had "failed to institute measures to take full advantage of technological progress as rapidly as possible" (p. 151). See also his testimony with respect to these examples in Hearings on Space Satellite Communications before the Subcommittee on Monopoly of the Senate Select Committee on Small Business, 87th Cong., 1st Sess. (1961), pp. 51-53.

A similar policy towards the relation of economic interest and technological advance was expressed earlier in Section 314 of the Communications Act, which sought to separate ownership of cable systems from ownership of radio systems in the international common carrier field.

<sup>73</sup> A top ITT official stated to Congress that if common carriers were not given control over this technology which could "seriously dilute" their existing investment, "it would then be the duty of the common carriers to their stockholders to avoid such dilution, insofar as possible, which would undoubtedly tend to reduce their use of the satellite system in favor of the existing systems which they own." 1962 Hearings quoted in Schwartz, "Comsat, the Carriers and the Earth Stations," 76 Yale L.J. 441, 452.

innovation in communications technology would be of little importance because these innovations involved unsettled issues of legislative and regulatory policy. The Commission states that these issues "will be resolved by the decisions made by Congress and the Commission, and not by the entry or lack of entry into the field of any single company" (R. 5304, ¶ 32); but it is apparent that many important issues may not even be presented to the Commission or the Congress unless there is a private party, motivated by a strong economic incentive, to promote the proposed innovation. The history of RCA's efforts in color television is again instructive, as is the Hughes Aircraft Company's sponsorship of the synchronous communications satellite. The need for preserving an environment in which all the feasible options will be explored and urged is especially evident here. The impact of potential innovation in these areas is just beginning to be considered as an issue of regulatory policy; neither Congress nor the Commission has made any detailed study of alternatives available,<sup>74</sup> and there is the clearest need for a vigorous promotion of innovation to balance the vigorous defense of the status quo.

### 3. *Erroneous Reliance on the Alleged Number of Comparable Companies*

The Commission states that "there are literally hundreds of manufacturers of equipment in or related to the broadcast market" and that "there can consequently be no claim that ITT is one of only a few manufacturers in, on the edge of, or capable of contributing to, technology in the broadcasting field or related fields" (R.

<sup>74</sup> This point is underlined by the Commission's announcement, since the decision below, of a study of specialized communications developments, and their social, political and economic impact. The Commission gives, as an example, the problems raised by cables affording "multiple communications channels of access to the home" and suggests questions concerning the emerging pattern of communications operation in this field, including TV signal distribution (FCC Public Notice—G2734, July 7, 1967).

5304, ¶ 31). This finding is plainly inadequate; as we have indicated, the issue is not capability in manufacturing or improving broadcasting equipment or components but, rather, capability in developing advanced systems of communications which would drastically change or supersede the existing structure of broadcasting transmission. Dr. Hill of MIT expressly distinguished between advances in components and techniques, which might be expected of companies presently involved in broadcasting, or of ITT-ABC after the merger, and those fundamental changes which would be contrary to the interests of these companies, e.g., by increasing the number of channels to the audience (J334, pp. 1-2, R. 3811-2).

The Commission also found that "[t]he basic technology of satellite and cable communications is well known, and that many companies are quite capable of developing and producing equipment for which there is a market demand" (R. 5304, ¶ 31). If this is intended to be a finding that many companies have the capability to design and construct satellite and cable communications systems, as opposed to manufacturing particular components or devices used therein, the testimony and documentary evidence in this record is entirely to the contrary. The evidence shows a relatively small number of firms with capability and resources comparable to ITT's in this area, (*supra*, p. 74) and the applicants put in no evidence as to the resources and capabilities of other companies.<sup>75</sup> We again suggest that, in an issue of this importance, the Commission was obliged to make findings in sufficient

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<sup>75</sup> In our filings with the Commission in advance of the hearing, we stressed that applicants had the burden of establishing the number of firms comparable to ITT in resources and interest; we also stated that, as a result of our investigations and interviews with some of the firms which might possibly be listed as comparable, we were prepared to file rebuttal evidence on that subject (R-64, Reply of Department of Justice to Opposition to Petition for Reconsideration, filed January 30, 1967, pp. 9-10; R-83, Rebuttal Statement by the Department of Justice, filed February 28, 1967, p. 5). Applicants failed to put in any evidence and sought, after the record was closed, to rely upon listings in trade references.

detail concerning the allegedly comparable firms, to permit this Court to provide an informed review. See pp. 58-60, *supra*. There is no basis, in the findings or the record, to support a conclusion that so many companies have the necessary capability in the advanced technologies that the adverse effect of eliminating ITT as a factor independent of the existing broadcasting structure can be dismissed as not being a significant detriment.

#### IV

**The Commission Erred in Its Conclusion That the Autonomy and Independence of ABC Would Be Unaffected by the Merger and That There Would Be No Adverse Impact From (a) Eliminating ABC's Independent Role in Regulatory Proceedings; (b) Creating Opportunities for Reciprocal Dealing in the Advertising Market; and (c) Impairing ABC's Independence and Integrity in News and Public Affairs**

We have shown, in Point III, that the merger is likely to have adverse impact by deterring or eliminating ITT's independent competitive efforts. In this Point, we turn to the impact of the merger upon important activities of ABC. These involve effects upon competition, related to ABC's independence in regulatory proceedings and in the advertising market; they also involve the vital area of broadcast journalism, the freedom and integrity of ABC's activities in news and public affairs.

The Commission, in discussing these issues, has found the public interest to be protected by the fact that the merger will not have *any* effect—ABC, it is said, will operate as before despite its change of ownership. But mergers carry a transfer in control, and must be appraised with an appreciation that they undoubtedly have consequences for the companies. We shall show, first, that the Commission's general conclusions of ABC's continued autonomy, and its heavy reliance on the parties' assurances to this effect, are inconsistent with the governing legal standards and with this record. We shall

then discuss the three specific areas in which the loss of ABC's autonomy gives rise to the likelihood of serious detrimental consequences.

*A. The Commission Erred in Concluding that the Merger will not Affect ABC's Autonomy Because of the Parties' Representations and Assurances*

At the non-adversary September 1966 hearing, the applicants represented to the Commission that ABC's continued independence was assured by "the ITT management system of substantially autonomous subsidiaries," and that ABC would be like "the other entities" in the ITT organization (Tr. 503). This was relied upon to avoid the prospect of a detrimental effect upon the regulatory process, the commercial market or upon ABC's news and public affairs activities (R-87, ¶¶ 22, 31, 36).<sup>76</sup> In the course of the adversary evidentiary hearing in April 1967, however, it became apparent that ITT was a highly centralized company, which the Commission now acknowledges (R. 5307, ¶ 40). Accordingly, ITT's president Geneen then represented that ITT planned "completely unique" relations with ABC (Tr. 1870, 1900, 1907, 1916, 1924). And the Commission now relies, for ABC's independence, upon the "unique" features of the proposed ITT-ABC arrangements, the extent to which they will depart from the "usual relationship between ITT and its other subsidiaries" (R. 5307, ¶ 40), and upon the parties' assurances and representations (R. 5307-11, 5314-5, 5324-6, ¶¶ 40-44, 47, 55-57, 78-81). We believe that the Commission's grounds are inadequate support for

<sup>76</sup> ITT's president testified that "the ITT management system of substantially autonomous subsidiaries will enable, and in fact require, both [ABC and another ITT company with conflicting interests] to present their separate views to the Commission" (Tr. 172). "The proposed operation of ABC as a substantially autonomous subsidiary, with the present ABC management and its distinguished board of directors, is harmonious with the present ITT management system and can be carried out in the manner contemplated in the application in full accord with ITT's responsibilities to the public and the FCC" (Tr. 167).

the conclusion that ABC's independence would continue after the merger.

1. In the first place, the Commission's decision is inconsistent with the legal criteria that have customarily, and properly, been applied to the problem of broadcaster autonomy. The emphasis has necessarily been upon the realities of control and ownership, rather than upon representations or promised internal arrangements. This Court has pointed out that the Commission does not ordinarily rely "on promises that a licensee would 'ignore' conflicts of interest among his enterprises" and it rejected an effort to do so in the absence of "special facts" (*Citizens TV Protest Committee v. FCC*, 121 U.S.App.D.C. 50, 54, 348 F. 2d 56, 60).

The basis for this policy, we believe, is a recognition that promises and internal arrangements (a) are not reliable in the long run to assure the independence of the broadcast enterprise and (b) cannot effectively be policed by the Commission. The first element was pointed out in the *Report on Chain Broadcasting*, *supra*, p. 18), when the Commission rejected a contention by NBC that its Red Network competed effectively against its Blue Network, and directed the divestiture that led to the creation of ABC. The Commission stated (p. 70):

Although the sales and program personnel allocated to the Red or the Blue Networks may now engage in friendly rivalry, it is hardly to be supposed that this rivalry would ever reach the point where NBC employees are acting against the best interests of NBC. Under such conditions, there can be no competition as that term is properly used.

The argument that the benefits of separate enterprises could be obtained by internal arrangements under common control was dismissed as offering "merely a shadow of competition without its substance" (pp. 70-71).<sup>77</sup>

<sup>77</sup> The Commission's discussion of this argument warrants a fuller quotation. It is, the Commission stated (Report, pp. 70-71), "a time-worn argument of corporations facing charges of monopoly. It proves too much, and reduces the whole theory of our competitive

A similar understanding led the Commission to formulate policies against the ownership of two or more stations of the same class serving substantially the same area. The purpose of these rules against so-called "duopoly," is to insure "arms-length competition among such broadcasting stations." *Shenandoah Life Insurance Co.*, 19 Pike & Fischer R.R. 1, 2 (1959). Even though "at a given time, no impairment of competition exists in fact," the policy still applied. For "it is the potential of such impairment which the Commission's policy is designed to guard against" (*ibid.*).

The inadequacy of regulatory control as a substitute for economic independence was acknowledged by the Commission when, in 1959, it adopted a rule requiring television networks to cease representing their own affiliates in the national spot television market. A major ground for this action was the finding that "the networks' role as national spot representatives for affiliated stations creates an inherent conflict of interest which has resulted in inhibiting competition between network and national spot television." *National Spot Sales Representation*, 27 F.C.C. 697, 720, 19 Pike & Fischer R.R. 1501, 1525. The Commission rejected the argument that it should permit this conflict of interest to continue and police it to prevent results contrary to the public interest. For "the conduct by a network of network television and national spot television in the circumstances here considered is not susceptible to effective regulatory control without an

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economy to an absurdity. What NBC's chairman was pleased to call 'competition' is not the thing that keeps the opportunity to engage in network broadcasting open to anyone willing to risk his capital and energy, nor does it assure the public benefits of the healthy and vigorous interplay of economic forces among those engaged in the business. If a single company owned and operated all the drug stores in a city, there would be no less monopoly because the company refrained from closing all the stores but one, or even organized sales campaigns among the various stores. As long as all the efforts of the employees redound to the benefit of a single employer, there is merely a shadow of competition without its substance."



excessive and, we think, an impracticable degree of supervision of the day-to-day judgments, activities and interrelationships of two divisions of the same network" (27 F.C.C. at 721, 19 Pike & Fischer R.R. at 1526). This Court affirmed, commending the Commission's use of structural relief rather than "an excessive and impracticable degree of day-to-day supervision" (*Metropolitan Television Co. v. FCC*, 110 U.S. App. D.C. 133, 135, 289 F. 2d 874, 876); see also *Rust Craft Broadcasting Co.*, 2 Pike & Fischer R.R. 2d, 83, 86 (dissenting opinion) reversed *Citizens TV Protest Committee v. FCC*, *supra*.<sup>78</sup>

2. Second, the record in this case, far from presenting "special facts" justifying a departure from the usual policy,<sup>79</sup> confirms the wisdom of applying that policy here. The Commission seeks to rely upon (a) internal corporate arrangements and (b) applicants' promises, but the record refutes this reliance and shows that the merger is highly likely to have the natural consequences of the

<sup>78</sup> This policy is, of course, reflective of the limited scope of the Commission's regulatory authority, *supra*, p. 17. We note, furthermore, that the Commission's policy is consistent with the teaching of antitrust experiences. Thus, the courts have rejected contentions that no adverse effects would follow from the acquisition of stock interests in competing firms, refusing to accept the argument that directors would be independent of stockholders who selected them. E.g., *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307, 314 (D. Conn.), affirmed 206 F. 2d 738 (C.A. 2); *Briggs Mfg. Co. v. Crane Co.*, 185 F. Supp. 177, 181-182 (D. Mich.), affirmed 280 F. 2d 747, 749 (C.A. 6). Recently, the Supreme Court, in an antitrust case, *United States v. Sealy, Inc.* 388 U.S. 350, 353, rejected the contention that a corporation was independent of its stockholders because the directors and stockholders "wore a 'Sealy hat' " when acting on behalf of the corporation: "We seek the central substance of the situation, not its periphery; and in this pursuit, we are moved by the identity of the persons who act rather than the label of their hats."

<sup>79</sup> See *Citizens TV Protest Committee v. FCC*, 121 U.S. App. D.C. at 54, 348 F. 2d at 60. The rule that an agency must articulate the basis for its actions requires adequate reasons for departing from the policy of prior cases. *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-443; *City of Lawrence v. CAB*, 343 F. 2d 583, 588-589 (C.A. 1).



change in corporate structure—that is, a shift of authority and control over ABC to ITT.

(a) The Commission erred in its statement that the relationship between ITT and its other companies “is not controlling or particularly significant” with respect to the potential autonomy of ABC (R. 5307, ¶ 40). The “ITT management system” is very relevant to this issue. As first incorrectly represented to the Commission, the ITT system was specifically relied upon by the applicants and by the Commission in support of the probability that ABC would be autonomous. By the same token, the evidence that the ITT system is inconsistent with an autonomous ABC shows that there will be a continuing pressure upon the ABC arrangements to conform.

The record at the evidentiary hearing demonstrated graphically the extent and pervasiveness of that pressure. The ITT management system is claimed to have transformed ITT from a holding company to a tightly controlled and coordinated organization (R-1, Ex. I-4, 1965 ITT Annual Report, p. 20). The headquarters officials exercise close and regular control over various subsidiaries and divisions, (Tr. 912-3, 1867-70, 3212-4, 3227). They are expected to resolve conflicts among companies, and their decisions are final subject to appeal to Mr. Geneen (Tr. 1895-6, 3249-51; see Tr. 966-7, 989; J79, R. 2052-3). As further examples, the ITT headquarters comptroller exercises direct control over financial activities and personnel of the various companies, as does ITT's technical director over the technical projects and personnel (Tr. 2609, 2818-31; see Tr. 911-12).

Coordination and control within the ITT organization are so well established that division and subsidiary officials are fully aware of the importance and desirability of conforming their particular activities to the overall interest of ITT as a whole. As the Commission's Broadcast Bureau put it (Tr. 4070), “the family concept which pervades the entire organization is frequently felt and recognized by all within the family group.” Thus, for

example, the president of ITT's Federal Electric Corp., appreciated the need of his not undertaking any CATV project in an area served by an independent telephone company without the concurrence of ITT's North American Telecommunications Group (Tr. 903-4). Notwithstanding Mr. Geneen's statement that ITT companies purchased on the merits (which the Commission fully accepts —R. 5311, ¶ 47), the president of ITT's Federal Electric Corp. believed that Mr. Geneen would be interested in the use of ITT equipment in ITT CATV systems, and made every effort to do so (Tr. 880-1; see J121, R. 2175; J134, R. 2232). He would always buy from ITT Companies if they came within 10% of the price of non-ITT suppliers (Tr. 937-8). He required no explicit direction from management to adopt the practice of renting cars from Avis (an ITT company) whenever available (Tr. 910-11).<sup>80</sup>

The principal "unique" arrangement, which is relied upon to insulate ABC from the centripetal force of the ITT management system, is that ABC will have a board of directors with a majority of "outside" or "independent" directors. And the Commission states that while the merger agreement requires this arrangement for three years, it accepts the parties' intention to continue it indefinitely (R. 5307-8, ¶¶ 41-42).

In fact, the contract provides that the arrangements can be terminated even within the three-year period if "there has been a material deterioration in the business or financial position" of ABC "which adversely affects the interests of ITT as a stockholder"; and that within the three-year period, ITT is to approve all replacements

<sup>80</sup> For some of the other examples in the record, see the overall increase in ITT's business with Avis after its acquisition, from 29% to 82% of its car rentals (AR87, R. 1561-3; Tr. 2340); the purchases by ITT's Puerto Rico and Virgin Islands telephone operating companies of nearly all equipment from ITT companies of the type available from them (J255, R. 3247); the plans to use an ITT finance company to support loans made by an ITT mutual fund manager (J181, R. 2420-1) and to sell insurance and mutual funds of two ITT companies to all ITT employees on a payroll deduction basis (J181, R. 2419; J189, R. 2482).

on the board of directors, and the ITT board will pass upon "matters of major importance" (R-1, Ex. 1-4, Section 4.6(h) of Plan and Agreement of Merger).

Immediately after the proposed merger, the ABC board will consist of 16 members—two top ITT officials, Mr. Geneen and ITT's treasurer, Mr. Perry; five officers or employees of ABC; and the nine directors who are not officers or employees of either corporation. Aside from other questions raised about the independence of some of these outside directors,<sup>81</sup> the fact is that the entire board will be responsible to ITT, the 100% shareholder, and will have a duty to act in its best interests, as Mr. Geneen acknowledged (Tr. 1870-1). Directors cannot be presumed to be independent of the stockholder which controls their selection and tenure, as the courts have held (fn. 78, *supra*). This is even more apparent when, as here, the authority of the stockholder, ITT, will be directly represented on ABC's board and executive committee by Mr. Geneen and another top ITT official, who plan to participate in all business decisions, including those dealing with programming and including those (like satellite rates), where ITT has conflicting interests (Tr. 1396, 1907-8, 1919-23, 1960-1).

It seems apparent that the ABC board will give great weight to the judgments expressed by Mr. Geneen and his colleague. A striking example of that proclivity was brought out in the course of the supplementary hearing. Mr. Geneen stated that it would be up to Mr. Goldenson (as ABC Board Chairman) to decide which matters were of sufficiently "major" importance to transmit for consideration of the ITT board; Mr. Geneen added that he

<sup>81</sup> The Broadcast Bureau contended (Tr. 4071-2) that the majority of the ABC board will not be independent on the ground that two of the outside directors will also serve on the ITT board and this would give them a loyalty to ITT as well as to ABC. The Commission responded (R. 5308, ¶ 42) by stating that assignment to the ITT board "does not compromise the independence of such directors" and may even give them "added prestige and influence . . . which may serve to enhance the independence of ABC."

would have no hesitancy in recommending such action (Tr. 1928-9). But Mr. Goldenson, recognizing the facts of life, testified that Mr. Geneen alone could bring any matter up to the ITT board (Tr. 244, 1641). It will be inescapable to all directors and officials of ABC that Mr. Geneen and ITT represent the ultimate authority.

The point will be brought home by innumerable contacts between ITT and ABC, and the resulting coordination and supervision. There have been many examples of such activities even before consummation of the merger, at all levels of the company. Mr. Geneen has evinced intimate personal concern with the business operations of ABC, which would be the largest source of revenue and profit for ITT. Thus, he has followed the Nielsen reports of ABC's audience ratings and instructed a headquarters staff official to keep him abreast of industry developments.<sup>82</sup> ITT has employed a "Director of TV Systems Planning" to oversee and assist in developing ABC's facilities plans (AR57, R. 1252; Tr. 2730), and this official has made recommendations to ABC staff and participated in their decision-making (Tr. 2724-6, 2731, 2739), and has suggested that "firm guidance" by ITT would be appropriate to resolve "internal disagreement" within ABC (J256, R. 3248; Tr. 2727, 2761). ITT and ABC officials at lower levels engaged in an unusual number of contacts beginning after the merger agreement (J321, R. 3732; Tr. 1284), and have discussed various opportunities to combine in joint and cooperative ventures.<sup>83</sup>

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<sup>82</sup> See BB25, R. 4396; BB26, R. 4397; J289, R. 3605; J290, R. 3607; Tr. 1160-1. Mr. Geneen directed use of ITT influence in order to prevent a change in the Nielsen reporting system which would be injurious to ABC (J332, R. 3807).

<sup>83</sup> E.g., use of ITT ground stations for ABC's broadcast of the Olympics (J241-J244, R. 3220-4); a proposed cooperative effort to establish television service, selling ITT equipment and ABC programming, in Portuguese Mozambique and Angola (J247, J248, J249, R. 3227-36); a proposed joint venture in Vietnam (J251, R. 3238; Tr. 1400).

These contacts have already had the anticipated effect. As noted, Mr. Goldenson recognizes Mr. Geneen's superior authority in the ABC board. A number of the cooperative projects were undertaken without considering an offer to another network or communications firm (E.g., Tr. 1878). And ABC's engineering chief stated that he would expect to rely upon ITT for various products and services, without competitive bidding (Tr. 2327-8; see Tr. 218, 261).

The Commission seeks to buttress the alleged ABC autonomy by resort to official notice. It finds as a matter of "common knowledge and experience" that "matters of major concern to companies of this kind are not resolved by a bare majority of votes on the Board of Directors" but by investigation leading to consensus (R. 5308, ¶ 42); and as a matter of "common sense and common knowledge of corporate organization and operations" that the ITT board will not concern itself with the details of ABC's business operations (R. 5309, ¶ 43). But the Commission cannot rely upon notice of these facts, which obviously are not common knowledge (see *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 301-304; *Cook v. Celebrezze*, 217 F. Supp. 366 (W.D. Mo.)). Indeed, as to the rule of majority vote, the Commission's "common knowledge" is contrary to corporation law. Moreover, if anything is a matter of "common knowledge" about the ITT organization, it is that authority is strongly and decisively exercised. The pervasiveness of control by Mr. Geneen and ITT headquarters, if not by the board, are established on this record.<sup>44</sup>

<sup>44</sup> A "unique" feature of the ITT-ABC relation, according to Mr. Geneen, is that the ABC board would directly report to the ITT board, and there would be no group executive in ITT headquarters with responsibility for supervising ABC (Tr. 1916). But this does not show that the supervisory and coordinating functions will be ignored with respect to ABC's activities. On the contrary, it indicates that in view of the importance of ABC to ITT as a whole, this function will be performed at a higher level of ITT management—in part by the ITT executive committee or the ITT board, and, more continuously, as has already occurred, by Mr. Geneen and his personal assistants.

Those responsible for the day-to-day operations of ABC are already in the process of accommodating themselves to the ITT system. The record does not permit a finding that the proposed ITT-ABC relationship is a "special fact" (*supra*, p. 84) which will ensure ABC's autonomy after the merger.

(b) In addition, the applicants' assurances, on this record, are inadequate to assure the autonomy of ABC. It is enough to point out that their current assurances conflict with those presented in the September 1966 hearing, that ABC would be like other "autonomous" entities in the ITT organization. Nor can the Commission properly rely, as it does so heavily (R. 5309, 5315, 5325, ¶¶ 44, 57, 80) upon a two page "ITT Policy Guide" issued within the company on November 1, 1966 (AR4, R. 194-5).<sup>85</sup>

The Commission quotes from this Policy Guide at length, and believes that it is entitled to particular weight because it was issued "after the first Commission hearing and before there was any intimation that the Department might seek to intervene in the Commission proceeding or challenge the proposed merger" (R. 5309, ¶ 44). In the FCC's view, this means that the Policy Guide "was not subject to the charge of being drafted for the purposes of this proceeding (R. 5326, ¶ 80). As a matter of fact, the Policy Guide does no more than restate the assurances which ITT and ABC officials had already presented to the Commission, and about which they had been questioned in testimony in September 1966. At the time it was actually issued, the Commission hearing had indeed

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<sup>85</sup> The Policy Guide declares that ABC's network and broadcasting operations would be kept separate, unaffected by other ITT operations; that ABC would independently take positions on regulatory matters before the Commission; that ITT would not influence television advertising or deal with ABC except "on a complete arm's length basis"; and that ITT would not attempt to influence the news, entertainment or other programming of ABC for its benefit (AR 4, R. 194-5).

taken place, but no decision had been rendered and requests for further information were being made by a number of Commissioners. Moreover, the Department's investigation was pending and active, as the applicants were fully aware. They were also aware that the Department might seek to challenge the merger in an antitrust case or in this proceeding. In fact, when the Department filed in this proceeding and was then required to submit evidentiary material in support of its petition for reconsideration, the applicants immediately responded by filing the Policy Guide, and relying upon it (R-80). Thus, they made evidentiary use of this document at the first possible opportunity.

Finally, it seems clear that the Commission cannot effectively police the assurances of autonomy without an "excessive and impractical degree of day-to-day supervision" (*supra*, p. 85). How is the Commission to determine whether Mr. Geneen dominates the ABC board, or simply persuaded his colleagues with superior arguments? How is the Commission to determine whether ABC staff decisions to prefer ITT, or to avoid acts detrimental to ITT, reflect their independent judgment, or result from direct or subtle pressures by ITT officials, or from the voluntary acceptance by ABC officials of their responsibility for the overall well-being of ITT-ABC? The independence and autonomy of ABC from ITT cannot be assured, if this proposed merger is carried out; the Commission's conclusion to the contrary is without adequate basis; and the detrimental effects of the probable loss of ABC's independence have to be candidly appraised.

***B. The Commission Erred in Finding No Detriment from the Loss of ABC's Independent Role in Regulatory Proceedings***

The loss of ABC's independence after the merger would be a serious detriment to the public interest in the effectiveness of the regulatory process, which is the arena where much of the competitive struggle takes place in the communications and broadcasting fields. This is



shown, we believe, by the unusually forceful and imaginative role which ABC has played in one of the most critical current areas of FCC regulatory policy, satellite communications. ABC virtually initiated the entire public debate on domestic satellite policy by proposing (with Hughes Aircraft Company) a special purpose system of synchronous satellites for broadcast purposes; it has maintained a vigorous advocacy of this system (J343, pp. 36-7, R. 3896-7); and, in the international field, it has also been a strong voice in favor of the right of broadcasters and other users to deal directly with Comsat rather than through the international common carriers, and in protesting tariffs filed by the international carriers (including ITT) (Broadcast Bureau Stips. 1-4, R. 106-132).

We have already discussed, in Point III, the importance of aggressive presentation of policy alternatives in the regulatory process. The likely impact of the merger upon ABC's role can be illustrated by the past conduct of RCA-NBC, which (as would the applicants) combines broadcast and common carrier operations. Although the Commission observed in its first opinion that the conflict between those interests "does not seem to have caused any difficulty in the case of NBC and RCA" (R. 87, ¶ 37), the supplementary record establishes the contrary. Thus, there has been a clear divergence of interest between the carriers and the major noncarrier users (such as the television networks) over the right of noncarriers to deal directly with Comsat and thus to purchase satellite circuits wholesale. In contrast to ABC, NBC has not participated at all in this controversy, when it arose in the so-called "global proceeding, in the allocation of Early Bird satellite channels, and in Comsat tariff proceedings (J343, pp. 29-31, R. 3889-3891). And NBC has refrained from taking a position on whether private domestic TV satellite systems should be authorized (J343, pp. 38-9, R. 3898-9). The history of these proceedings supports the analysis of the expert witness who concluded that RCA-NBC has balanced its internal competing interests and,

in important areas, the common carrier interest prevailed over NBC (J343, pp. 29, 45-49, R. 3889, 3905-9).

The Commission now finds, however, that even loss of ABC autonomy would not be a detriment to the public interest because ITT's top management has "such character and ability" that their participation in ABC would be a "plus" (R. 5310, ¶ 45); and because of the "small area of conflicting interest" between ITT and ABC (¶ 45).

As to the first, the answer is that our concern with ABC's independence is not a challenge to the calibre of ITT's management, but to the detrimental effect of conflicting interests upon ABC's activities on important regulatory matters.<sup>86</sup>

As to the extent of potential conflict, the Commission relies upon the fact that ITT is an international common carrier, while "the overwhelming proportion of a domestic network's common carrier's usage is domestic" (R. 5310, ¶ 45). But the proceedings to date are only illustrative of the issues of regulatory policy which can be expected to arise in the future out of the revolutionary developments in communications technology. ABC has itself emphasized that international television transmission will become increasingly important—that there is an "era of global television immediately ahead" (R-1, Ex. 1-3, Att. H, pp. 19, 26 Tr. 1960).<sup>87</sup> Moreover, as to domestic tele-

<sup>86</sup> Note that Mr. Geneen and his ITT colleague on the ABC Board plan to participate in ABC decisions on satellite matters, notwithstanding the existence of conflicting interests between ITT and ABC. When so voting, Mr. Geneen stated that he would act for the best interests of ABC; on the same issue before the ITT board, he stated he would take an independent ITT position (Tr. 1960-1). Compare the Supreme Court's recent observation in an antitrust case, that it is "the identity of the persons who act rather than the label of their hats" which determine whether a corporate board is independent of other interests (*United States v. Sealy*, 388 U.S. 350, 353). It was acknowledged that ITT directors on the Comsat board do not participate in voting on matters in which there is a conflict of interest between Comsat and ITT (Tr. 2260, 3244-6).

<sup>87</sup> At the time of the merger agreement, ABC regarded ITT's assistance in foreign television operations to be one of the important benefits to it (AR2, R. 137; J5, R. 1585).

vision, ITT and other international record carriers have opposed ABC's espousal of a private domestic satellite system. The international carriers may be motivated by the desire to avoid a precedent which would undermine their international position. They also are important stockholders in Comsat, the primary beneficiary of a multipurpose system (J343, pp. 4-5, 23-26, 41-45, R. 3864-5, 3883-6, 3901-5). There is, thus, no adequate basis in subsidiary findings or in the record to support the Commission's conclusion that the future areas of policy concern, on which ITT and ABC interests may clash, are of little significance.

In the satellite field alone, as the record shows, the television networks' current and prospective stake makes them the largest private noncarrier user for the foreseeable future (J343, p. 2, R. 3862).<sup>88</sup> If independent of conflicting interests, ABC would continue to make an important contribution. We do not urge that loss of ABC's independent voice is a certainty; but "the potential of such impairment" (*Shenandoah Life Insurance Co.*, *supra*, p. 85), resulting from the merger is a detriment. The

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<sup>88</sup> As the expert stated, the large users may seek to secure the benefits of cost reductions directly for themselves by obtaining direct access to Comsat; or may, by their competitive threat to do so, jar loose from carriers more extensive and speedier general rate adjustments which reflect satellite economies. The efforts of large users can induce a wider diffusion of satellite economies (J343, p. 1, R. 3861).

It is recognized that CBS is still independent of conflicting common carrier or manufacturing interests. That there will be a tangible loss, however, if only CBS is left as an independent voice for the distinctive interest of network broadcasters is shown by ABC's initiative in the domestic satellite field (Tr. 2916). It was also noted that business and industry users of broadband circuitry for data and other purposes may ultimately emerge as an additional large user influence, but this is not a present or imminently foreseeable factor (J343, p. 2, R. 3862). In addition, while this has not yet become an important factor, the expert witness also indicated the special interests that an equipment manufacturer (like ITT) may have in domestic satellite policy (J343, pp. 45-49, R. 3905-3909).

Commission erred in failing to weigh it in the public interest.<sup>89</sup>

*C. The Commission Erred in Finding no Detrimental Effect upon Competition in the Television Advertising Market*

The Commission's conclusion that there will be no adverse effect upon the television advertising market is based upon its uncritical acceptance of the applicants' representations as to the autonomous operation of ITT companies. Thus, the Commission finds that ITT companies "are responsible for procurement and delivery of goods and services at the most competitive price" (R. 5314, ¶ 55), and to "do so most economically and efficiently from the viewpoint of their own operations, without regard to other ITT affiliates" (R. 5311, ¶ 47). These findings correspond to applicants' self-serving statements (including the ITT Policy Guide). But the record is unequivocally to the contrary. In fact, ITT companies purchase within the "family" where possible, prefer to engage in co-operative efforts with other ITT operations, and look to the overall benefit to the ITT organization (*supra*, pp. 87-88). The Commission's failure to consider the realities shown by the record, instead of the assurances tendered by the parties, was error.

Our contention was not that ITT's economic leverage would surely be used to obtain advertising revenues for ABC from ITT's suppliers and others with which it has business relations. It was, however, that in this highly

<sup>89</sup> In discussing the issue of ABC's autonomy, the Commission further stated that it could not think of any situation in which a conflict of interest was likely between ITT and ABC in commercial situations (R. 5311, ¶ 47). ABC is a relatively small purchaser of most products and services in the fields in which ITT is engaged. But the communications satellite experience demonstrates that ABC is quite important as a potential customer or sponsor of developments in communications technology. The merger's likely effect of eliminating ABC as an independent market for competitors of ITT, such as Hughes Aircraft Company, was discussed in Point III-C, *supra*.

concentrated industry of network television, the creation of a substantial opportunity for reciprocal dealing was an adverse effect, because it could place serious obstacles in the way of the potential entry and viability of new competitors for whom unhampered access to the advertising market will be critical. That such opportunity for reciprocal dealing would result from the merger is shown by the evidence that reciprocity is practiced in the advertising industry, that advertising expenditures can be used for such purpose (Tr. 3695);<sup>90</sup> and that ITT, as a highly diversified company, makes substantial purchases from companies which are important network advertisers (for example, ITT's purchases from the three major automobile manufacturers exceeded \$120 million in the two years 1965-1966 (J239, R. 3135; J260, R. 3274)). Eight of such companies alone account for about 8% of total network advertising revenues.<sup>91</sup>

The Commission did not dispose of this contention on the basis of record evidence or special knowledge concerning the broadcasting industry. It undertook, rather, an analysis of the recent antitrust cases on reciprocal dealing.<sup>92</sup> On that basis, it determined that since a mere "possibility" of reciprocal dealing is not adequate for illegality, there was no possible detriment here.

The Commission has misconceived these authorities. While the courts distinguish between a "probability" and "mere possibility" of reciprocal dealing, it is clear that

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<sup>90</sup> See also Hausman, *Reciprocal Dealing and the Antitrust Laws*, 77 Harv. L. Rev. 873, 876, fn. 13, referring to reciprocal purchasing involving advertising in the periodical field.

<sup>91</sup> ITT's major suppliers in 1965 are listed in J239, R. 3135-48. Among the important suppliers are the four domestic automobile companies, Shell Oil, Gulf Oil, General Electric and duPont, whose network advertising expenditures in 1966 were \$111,122,400, out of total network revenues of \$1,411,292,600 (*Broadcasting*, April 17, 1967, pp. 38, 41).

<sup>92</sup> *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965); *United States v. Ingersoll-Rand*, 320 F. 2d 509 (C.A. 3, 1963); and *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966).

the existence of a significant probability is shown principally by structural evidence, and does not require a proof of a coercive program or predatory intent by the companies. The use of a structural analysis is an essential aspect of the law governing mergers, which calls for standards to appraise the likelihood of anticompetitive consequences in advance of the transaction (see *United States v. Procter & Gamble Co.*, 386 U.S. 568, pp. 56-57, *supra*).

It is particularly apt for reciprocal dealing, whose adverse effects may result without overt predatory conduct, as the courts have recognized. Thus, the Supreme Court upheld the Federal Trade Commission's finding that "merely as a result of its connection with Consolidated [the acquiring company], and without any action on the latter's part, Gentry [the acquired company] would have an unfair advantage over competitors enabling it to make sales that otherwise might not have been made" (380 U.S. at 597). And the Third Circuit underscored the importance of such an approach when it pointed out, in *United States v. Ingersoll-Rand*, 320 F.2d at 524:

[T]he mere existence of this purchasing power might make its conscious employment toward this end unnecessary; the possession of the power is frequently sufficient, as sophisticated businessmen are quick to see the advantages of securing the good will of the possessor. Certainly the steel producer who seeks orders from Ingersoll-Rand may tend to prefer the acquired companies as a source of supply . . . and the advantages accruing to him from so favoring the acquired companies would not have to be pointed out by Ingersoll-Rand.<sup>93</sup>

<sup>93</sup> The Commission also notes (R. 5314, ¶ 54) that ITT suppliers' spending on television advertising is larger than their sales to ITT. But the cases show that threat of reciprocal dealing arrangements is not obviated by the absence of great economic leverage. Mr. Justice Stewart pointed out in *Consolidated Foods* that Consolidated needed the products of Armour & Co. regardless of the latter's purchases from Consolidated's subsidiary (380 U.S. at 607); nevertheless, Armour advised Consolidated that, all other factors

The Commission did not provide an adequate ground for concluding that there is "no likelihood" of adverse effect (R. 5329, ¶ 84(7)). It could not rely upon the alleged independence of all ITT companies from each other, refuted by the record; and it could not summarily dismiss the problem created in the advertising market by this merger of a major network with a large diversified company which prides itself upon the ability to maximize the coordination and profitability of its widespread operations.

***D. The Commission Erred in Finding No Detriment from Impairment of ABC's Independence and Integrity in News and Public Affairs***

The likelihood that ABC will not have independence and autonomy within the ITT organization is highly material to the merger's effect upon the independence and integrity of ABC as a news and public affairs medium. The Commission acknowledged this issue to be among the most important in the case (R-87, ¶¶ 22, 36; R. 5322, ¶ 73). But the Commission's consideration of the issue was not responsive to its importance. Its reasoning and findings are not adequate to support the sanguine conclusion that ABC's news operation will be as independent "as it has been previously" (R. 5329, ¶ 84) and that no adverse effect can be anticipated.

We submit that the Commission decision on this point is erroneous on two grounds. First, the Commission had no valid basis for accepting the companies' "multifold assurances . . . that the freedom of ABC's programming from the intrusion of considerations stemming from ITT's nu-

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being equal, Armour was willing to "reciprocate and cooperate" (380 U.S. 596). Similarly, in the *General Dynamics* case, the Court rejected the argument that reciprocity was not a real danger because the defendant's purchases were quite small compared to the total sales of its suppliers. The Court found that General Dynamics' purchases from Shell during the relevant period were an insignificant part of the latter's total sales of approximately \$2 billion, yet it was able to obtain an agreement for mutual patronage (258 F. Supp. at 64-65).



merous and important non-broadcast interests" would be maintained (R-87, ¶ 22) without first assessing the strength of the pressures in ITT which would operate against fulfillment of the assurances, the adequacy of the proposed ITT-ABC internal arrangements, and its own ability effectively to ascertain and remedy violation of the assurances. The Commission failed to make adequate findings on these points. And it is clear, we believe, that a proper analysis would have necessitated the conclusion of a risk in this transaction to the independence and objectivity of ABC's news and public affairs activities. Second, this error was compounded by the Commission's disregard of the direct evidence of ITT's interference with the independent reporting of the news during the course of this proceeding.

1. *Erroneous Disregard of the Pressures of ITT Interests upon ABC's News and Public Affairs Activities*

Neither of the Commission's opinions makes any specific findings about the nature of ITT's other commercial interests and the extent to which they are in conflict with ABC's objectivity in news and public affairs. The Commission first stated only that "ITT has extensive foreign investments" which were assertedly "examined in considerable detail" and "weighed carefully", and it expressed confidence that no untoward result would follow, from the fact it had seen "no evidence at any time" that the substantial foreign interests of other licensees "have influenced any of the programming presented in this country" (R-87, ¶ 36); or that other licensees' "large and diversified non-broadcast activities" had affected "the objectivity of their news reporting and commentary" (R-87, ¶ 30). The Commission's second opinion merely repeated these generalities (R. 5324-5, ¶ 78).

The implication that ITT is just another company "with substantial foreign interests" not materially different from RCA, CBS, or other broadcasters, is contrary

to the uncontradicted evidence of record. At the evidentiary hearing, it was established that, unlike most American companies doing business abroad, ITT is, in origin, a foreign operating company, and its predominant source of profit overseas is in the sale of telecommunications equipment (J331, R. 3778, 3780-9, 3793; J184, R. 2436-40). Since the postal, telephone, and telegraph functions in other countries are almost invariably performed by governmental entities, ITT's position in these markets is largely dependent upon its success in dealing with the officials of governmental or quasi-governmental bodies (J183, R. 2430), and it is even involved in making or arranging loans or credits for such governments to purchase equipment (see AR83, ITT Board meetings of February 10, 1965, August 10, 1966, September 14, 1966, October 12, 1966, R. 1539, 1547). In addition, ITT owns large utility operating companies in a number of Latin American countries, most notably Chile and Peru (see J184, R. 2441; J188, R. 2465). These operations involve continual problems of maintaining good relations with the governments, negotiating with high officials over rates and services, and attempting to ward off pressures within the country for nationalization or other curtailment of the company's role (see AR83, ITT Board Meetings of July 10, 1963, August 14, 1963, January 8, 1964, December 9, 1964; March 10, 1965, January 12, 1966—R. 1524-8, 1532, 1534, 1538, 1540, 1545).

The record further shows that ITT's efforts to protect and develop its existing foreign interests, and aggressively to seek out new opportunities, new projects, and new areas of investment has inevitably involved the company in high-level negotiations and discussions with officials of foreign companies. As an example, the documents in Exhibit J261, R. 3276, *et seq.* demonstrate that, in the course of its campaign to win the necessary governmental approvals for a transatlantic cable system, ITT had occasion to engage in discussions at the highest levels of a number of foreign governments; to make use of, and benefit from, the affirmative support and personal

friendships of some of the highest officials of these governments; and to seek out (and receive) confidential information about the internal deliberations of these governments and the probable actions which they would take (see excerpts quoted in the dissenting opinion, pp. 75-78, R. 5408-11). (We submit that this material was admissible and relevant to show the character of the foreign involvements which are the natural consequence of ITT's telecommunications business, and we set out in the footnote below our argument against the Commission's exclusion of the material.)<sup>94</sup> Many of the company's activities involve countries which currently receive extensive coverage by American news media,<sup>95</sup> and ITT's regional

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<sup>94</sup> The Examiner excluded J261 from the record on the sole ground that the occurrences recorded therein were too remote in time from the present proceeding (Tr. 2810). The documents in J261 date from 1954 and 1955, and consist of 23 documents introduced in evidence or received by the Department of Justice from ITT in connection with pending litigation in the Court of Claims, *Commercial Cable Co. v. United States*, Ct. Cls. No. 213-60. Also covered by the ruling are J357, R. 4157-4164, an exhibit identifying persons in J261, and testimony by Mr. Asher Ende, Deputy Chief of the Commission's Common Carrier Bureau (Tr. 2655-2710).

The Commission affirmed all of the evidentiary rulings of the Chief Hearings Examiner (R. 5293, ¶ 5), without any discussion of the Department's claims of error. We submit that the exclusion of J261 and related evidence was erroneous and was prejudicial to proper consideration of the case. As the dissenting Commissioners point out (R. 5408-11), remoteness in time pertains only to allegations of misconduct. This material was relevant to show the character of the foreign involvements in which ITT normally engages, and there is no evidence of significant change in ITT's method of doing business abroad on such projects. (More recent negotiations for cable concessions, for example, took place in Brazil, Argentina, Peru and Chile in 1964—AR83, Meetings of July 8 and September 9, 1964, R. 1537-8.) Moreover, important ITT officials involved in the J261 negotiations are still prominent in the company management (e.g., Admiral Ellery Stone, John A. Hartman, Jr.—See J357, R. 4160, 4162; Tr. 3253-4). The events in J261 came to light only because litigation was instituted by the current ITT administration (although they should have been reported to the Commission (Tr. 2669-70)).

<sup>95</sup> See AR83, R. 1522-55; R-56, ITT letter of December 8, 1966, Att. 9, pp. 3-4.

management teams are intended to provide it with a sensitive reaction to world affairs (R-1, Ex. I-4, 1965 Annual Report, p. 20). ITT's sensitivity to political development is exemplified in statements of its president, Mr. Geneen, expressing concern over the effect upon ITT business of "socialist" or "semi-leftist" tendencies in England and Italy, anti-United States feelings in France, Common Market pricing practices, and nationalist movements in Latin America (J183, R. 2429-31).

In the light of the nature of ITT's foreign interests, it is apparent that its ownership of a major news medium would give rise to serious conflicts of interest not comparable to other licensees. ITT could have strong motivation to use a news medium affirmatively to promote certain of its foreign interests, by showing the officials or programs of a foreign government in a favorable light. More troublesome is the conflict between ITT's intimate involvements abroad and the conscientious coverage and analysis of news and political events by ABC. One can imagine the embarrassment to ITT of an unfavorable program concerning the British Defense Minister and Canadian Foreign Minister, persons of newsworthy prominence, who were providing ITT with confidential information relating to approval of the transatlantic cable project (J261, Atts. i, m, R. 3293, 3303-4). Similarly, there is a great difference between the impact upon ABC of the arrest of its correspondents for their news activities in Spain earlier this year,<sup>96</sup> and the impact of a similar event upon ITT. Searching coverage and analysis of foreign events may invoke the extreme displeasure of a particular foreign government. While resulting sanctions may be an affront or an annoyance to a news medium, such measures against ITT could seriously affect its vital interests. ITT's telecommunications activities in Spain are responsible for about 7% of its total sales.<sup>97</sup>

<sup>96</sup> New York Times, February 7, 1967, p. 11.

<sup>97</sup> R-56, ITT letter of December 8, 1966, Att. 9, pp. 3-4.

The Commission should have considered (but did not) the extent to which ITT's unusually important foreign interests would give rise to pressures by ITT officials to avoid programming likely to cause it difficulties or economic losses. More than that, the Commission should have considered the extent to which an awareness of the corporation's interests would have a restraining effect upon the independence and initiative of ABC's employees after the merger.

Commissioner Johnson's first dissenting opinion refers to a considerable body of empirical study in the fields of sociology, public opinion and journalism which suggest the subtle pressures and accommodations leading reporters to temper the expression of their own views in order to avoid conflict with important economic interests of the news medium.<sup>88</sup> While the Commission did not refer to any of these studies, it cited for another purpose (R. 5321, ¶ 70, fn. 6) the recent writings of one of television's most distinguished journalists, Fred W. Friendly. In the same book, Mr. Friendly expressed a judgment which confirms the studies referred to by Commissioner Johnson. Referring to a practice under which his network allowed its affiliated stations to view a documentary program before deciding whether to grant it clearance, Mr. Friendly stated: <sup>89</sup>

I must admit that this system tempered our broadcasts. The stations didn't try to influence our choice of subjects any more than the management did, but I found myself subconsciously applying a new kind of conformity to our documentaries. Looking back now, I suppose that I was subtly influenced to do controversial subjects in a noncontroversial manner. We did handle tough subjects and we often did them well, but there were no strong endings . . . . Our

<sup>88</sup> R-87, dissenting opinion of Commissioner Johnson, footnotes, pp. 23-27.

<sup>89</sup> Friendly, "Due to Circumstances Beyond Our Control . . ." (Random House, 1967), p. 135.

techniques improved through the years, but in balancing arguments rather than objectively weighing them, we were sacrificing one ingredient of good journalism.

To be sure, it may be suggested that certain pressures of this sort are inherent in the system of commercial television broadcasting. But the Commission, we submit, was obliged to consider that ITT was not the same as other licensees and that the merger would increase the pressure upon vigorous, unfettered discussion of news and public affairs on a major network.

*2. Erroneous Reliance on the Internal ITT-ABC Arrangements and the Regulatory Controls Affecting News and Public Affairs Activities*

ITT has been quick to supply assurances that "regardless of the type of economic reprisal threatened" against any of its foreign interests, it would never take measures to prevent ABC's reporting of a new or documentary item.<sup>100</sup> We need not question the good faith with which such an assurance is offered in order to urge that the Commission could not validly rely upon "promises" to ignore the inherent "conflicts of interest" for ABC news and public affairs resulting from the merger (*Citizens TV Protest Committee v. FCC*, 121 U.S. App. D.C. at 54, 348 F.2d at 60). Nor, we submit, can the assurances be significantly strengthened by reference to the proposed ITT-ABC relations or to the Commission's regulatory powers.

(a) We demonstrated above, Point IV-A, that the premise of ABC's autonomy, resting upon assurances

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<sup>100</sup> R-56, ITT letter of December 8, 1966. Although this record contains much documentary evidence showing ITT's pre-merger analysis of ABC, there is no evidence that ITT considered the impact which ABC's independent reporting of the news could have on ITT's overall corporate interests. And there is no evidence that ITT, prior to the merger agreement, arrived at the deliberate judgment that it was prepared to bear the full economic risks of ABC's independent news reporting.

and statements of intention, is unreliable. We suggested that the proposed ITT-ABC relationship and the obvious facts of commercial reality will result in a change in control; the proposed actions or inactions of ABC which affect vital interests of the parent will be decided by ITT—by its Board of Directors, its Executive Committee, or Mr. Geneen. There is not the slightest reason to suppose that decisions in the area of ABC news and public affairs programming would be any exception.

The Commission suggested that, in any event, there will be another protective layer of autonomy—the autonomy of the ABC news division within ABC (R-87, ¶ 22; R. 5324, 5326, ¶¶ 78, 81). This, however, disregards the evidence introduced in the evidentiary hearing which showed that ABC news is not and will not be completely and reliably autonomous within the structure of the network. Concededly, there is no evidence that ABC's management has involved itself in the day-to-day running of regular news programs. But the production of documentary programs and the coverage of special news events are subject to important controls by ABC's business management. First, there is the overall budgetary control of the ABC board; if the proposed expenditure for a documentary or special news coverage is unusually large, the ABC board would ordinarily pass upon it (Tr. 3576-8, 3284). The record is also clear that the news division cannot decide on its own to "preempt" a time slot for a documentary news program; this decision involves the network business officials and, in the event of conflict (which has occurred), the top management of ABC (Tr. 3287-8, 3306-8). Most important, the selection of the documentary programs to be produced and run on the network involves an important economic judgment, i.e., determining which of the possible documentary programs will be attractive to a prospective sponsor (Tr. 3294-5). ABC's news head acknowledged that among the many documentary ideas, those which get produced are, by and large, the ones which the sponsors select (Tr. 3297-8), and that ABC news would not knowingly ap-



proach a sponsor with a documentary which obviously conflicted with the sponsor's economic interest (such as inviting a cigarette company to sponsor a documentary on the problems of smoking and health) (Tr. 3295). Since the production of documentaries takes the news officials outside the realm of news judgment into "economic reasonableness", as the ABC news head conceded (Tr. 3295), it must be assumed that those same officials would at the least be conscious of the "economic unreasonableness" of proceeding with a documentary program which would be seriously detrimental to the parent company's economic interest.<sup>101</sup>

(b) The Commission itself promises "continuing scrutiny" of the independence and integrity of ABC's operations, and it also relies upon allegedly satisfactory experience with other licensees which are diversified corporations with substantial foreign interests. But the Commission does not explain the basis for its knowledge of the performance of these other licensees. Nor does it explain how it proposes to check upon ABC.

As stated in Commissioner Johnson's first dissenting opinion (R-87, dissent, p. 32), the Commission has no system for monitoring the networks' news and public affairs programming. It has never undertaken investigation of the impact of licensees' other interests upon such programming, or given other special attention to it. Moreover, a continual process of demanding explanations as to why particular news items or programs were or were not shown would come dangerously close to the kind of program censorship which is barred by the First Amendment and Section 326 of the Communications Act. The Commission has not been given "supervisory control of programs, business or policy" (*FCC v. Sanders Bros.*, 309 U.S. at 475). In the circumstances, the Commission has to rely principally upon the objective facts

<sup>101</sup> The sponsor rarely reimburses ABC for the full cost of producing the documentary (Tr. 1656-7), and the network itself is, in a real sense, a partial sponsor of such programs.

about the applicant—that is, the nature and strength of the interests which it has in conflict with the broadcaster's journalistic functions.

Moreover, the nature of the problem confirms the inadequacy of regulatory controls as a remedy. Our concern is with internal corporate pressures and with subtle influences which result in avoidance of subject matter, blunting of criticism, the treatment of controversy "in a noncontroversial manner" (Friendly, *supra*), because of the economic interests of the company. The Commission has no basis for its conviction that these influences have not been operative with other licensees, and has not indicated any effective way of ascertaining their absence in ABC after the merger.

The impossibility of relying upon the agency's policing of such an assurance undermines the basis for the Commission's satisfaction that ITT "has given assurances of record" that it will not change its declared policy against any interference with ABC's news activities "without advance written notice to the Commission. We rely upon these assurances and have ample authority to enforce them" (R. 5326, ¶ 80).<sup>102</sup> It is plainly absurd to think that the FCC will receive advance written notice before ITT tries to "kill" an ABC documentary, or before ABC officials on their own shelve subjects which would be embarrassing or detrimental to ITT. It is equally inadequate to rely upon the Commission's own ability to uncover such developments.

### 3. *Erroneous Disregard of the Evidence of ITT Efforts to Influence Coverage of this Proceeding.*

Although the news and public affairs issue was initially discussed before the agency in the structural terms pre-

<sup>102</sup> ITT counsel explained to the Commission that this Policy Guide represents a standard of behavior with regard to ABC which is higher than that which ITT officials observe towards other news media (Tr. 4255, 4257). The latter standard is indicated by the evidence in the following section of the brief; and the disparity between those standards adds to the unreliability of assurances in this context.

sented above, evidence came to light, in the midst of the hearing, that ITT had tried to influence the coverage by news media of this very proceeding. Despite the Commission's earlier promise of "continuing scrutiny for any indication that our reliance upon the assurances and safeguards set out on this record was not warranted" (R-87, ¶ 22), it summarily dismissed the significance of this evidence. This was clear error. The Commission was required to weigh it against approval of the merger.

The direct evidence of ITT's readiness to interfere with the editorial judgment of independent news media included the following series of acts by important ITT officials, designed to influence the manner in which The New York Times covered this case.

The most serious episode involved Mr. Edward J. Gerrity, Senior Vice-President of ITT, in charge of public relations for the company, and a member of its Management Policy Committee (J331, p. 33, R. 3805). Mr. Gerrity visited the Washington offices of The New York Times on February 1, 1967, and engaged in a lengthy conversation with Miss Shanahan, the Times reporter assigned to cover this proceeding. In that conversation, Mr. Gerrity insisted that the reporter recommend to her superiors that the complete text of a particular document (a Commission order) be printed, contrary to her judgment as to the importance of the document; he repeatedly insisted that The New York Times should print the full text (Tr. 2959-60, 2974). The reporter described Mr. Gerrity's tone as "accusatory and nasty" (Tr. 2962, 2992). He asserted that the Times reporter should feel responsibility to the shareholders who might lose money as a result of what she wrote, referring to fluctuations in the price of the stock of one or both of the companies in this proceeding, as against the reporter's view that her responsibility was "to find out the truth and print it" (Tr. 2961). And he expressed the view that The New York Times should consider a particular Commissioner's attitude on issues which would have an economic impact upon the Times (i.e., his alleged support of legis-

lation prohibiting newspaper ownership of broadcasting stations) before it gives coverage to the activities or opinions of the Commissioner on any subject (Tr. 2962).

The head of ITT's Washington, D. C. public relations office, Mr. Horner, was involved in other contacts with the Times reporter. He expressed objections about a Times story on the ground that "there was no story," i.e., the facts set forth in that story were not newsworthy and should not have been given the prominence which it received in the newspaper (Tr. 2964). He asserted that a particular item in the paper was "unfair" to ITT, and challenged the Times coverage of the proceeding as having been "unfair" from the start (Tr. 2964-6). This official also insisted to the Times reporter that a particular event should be reported prominently in The New York Times, with "headlines just as big . . . as on what happened the other day," referring to a prior story on another day which apparently had displeased ITT (Tr. 2962). And, similarly, another representative of ITT stated to The New York Times reporter that he expected to see an ITT news release featured "in the paper, high up in your story" (Tr. 2958, 2969).

With the exception of the Gerrity statement concerning an FCC Commissioner, the Commission finds "there is no evidence that ITT or ABC did any more than ask reporters covering the proceeding to be factually accurate in their reporting" (R. 5324, ¶ 77). This finding is directly contrary to the evidence. Demanding that a news release be run high up in the reporter's story, demanding that the full text of an order be printed, protesting a reporter's story on the ground that its content was not newsworthy—these actions plainly have nothing at all to do with the correction of factual mistakes. They can only be regarded as attempts to impose the judgment of a financially interested party upon the journalistic judgment of an independent news medium—the very matter of concern in ITT's assuming responsibility for ABC's news and public affairs activities. And they came

at a time when one would have expected ITT to make its best efforts to respect the independence of the press.

The Commission finds Mr. Gerrity's statement concerning the FCC Commissioner to have been improper, but it adds immediately that it was "isolated in nature" (R. 5324, ¶ 76). In support of this characterization, the Commission relies (¶ 76) upon the testimony of the Times reporter that after her encounters with the ITT officials, she inquired of the Times' Financial Editor whether ITT had a reputation for "being this way all the time" and received a negative reply (Tr. 2974). The hearsay declaration is a totally inadequate support for the Commission's conclusion. As a result of ITT's failure to present the testimony of the officials involved in those episodes, or of other responsible officers, it must be presumed as a matter of law that there is no exculpatory explanation.<sup>103</sup> The presumption is, therefore, that the conduct shown by the record was either condoned or authorized by ITT management; indeed, at the argument before the Commission, ITT counsel refused even to concede that it was improper (Tr. 4252-3, 4256).

The Commission's dismissal of the evidence of impropriety as "isolated" in effect gives ITT the benefit of the doubt without any valid reason for doing so. The Department's investigation, which produced most of the documentary evidence in this proceeding, focussed on anticompetitive effects and did not address itself to ITT's practices with regard to news.<sup>104</sup> There was no "wide

<sup>103</sup> *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226; *Washington Gas Light Co. v. Biancaniello*, 87 U.S. App. D.C. 164, 183 F. 2d 982; *National Labor Relations Board v. Ohio Calcium Co.*, 133 F. 2d 721, 727 (C.A. 6). The record does not reveal the nature and extent of the contacts which the Financial Editor has had with ITT and, particularly important, whether any of them occurred in a context, like the present, in which ITT had extraordinary economic interests at stake.

<sup>104</sup> The ITT pressures were described in a newspaper story during the hearing (*Wall Street Journal*, April 17, 1967) and the Department subpoenaed the New York Times reporter and other members of the press after that story appeared and the Broadcast Bureau

ranging inquiry" into this subject (as the Commission suggests, R. 5325, ¶ 79), only chance discovery of outrageous conduct. What possible basis can there be, in a proceeding in which the applicants bear the burden of establishing that the transaction is in the public interest, for a presumption that all of ITT's other contacts with the press which are not in the record and of which the Commission has no knowledge would tend to show a pattern of uniformly proper conduct rather than further instances of improper conduct? <sup>105</sup>

On this record, the evidence of ITT's improper conduct, the probable pressures arising from its economic interests and the inadequacy of safeguards, compel the conclusion that the merger threatens to impair the integrity and independence of ABC's news and public affairs activities.

## V

### **The Commission Erred by Failing to Give Weight to the Lack of Candor of Applicants' Principal Officers in This Proceeding as a Factor Against Approval of the Merger**

The Department is constrained to raise the issue of the candor of applicants' principal officers on this appeal, as it did before the Commission. The issue of the truthfulness of a licensee or applicant is inherently and

gave notice of intent to call the ITT officials involved to testify (Tr. 2811-2). The Broadcast Bureau withdrew this request after the reporters had testified.

<sup>105</sup> Subsequent to the Commission's decision, a United States Senator has alleged that ITT made representations to newspapers in his State, similar to those made to Miss Shanahan, in an effort to affect their coverage. We do not suggest that the validity of such an allegation is to be established on the basis of a newspaper article. But it does show that the Commission had no basis for its assumptions about ITT's general conduct toward the press. See *Variety*, August 23, 1967, p. 29, describing the Senator's allegation and reporting the newspaper officials' description of the ITT contacts. The Senator's reference was to alleged representations by ITT officials that he was considering supporting legislation to prohibit newspaper ownership of broadcast stations.

necessarily involved in the decision whether grant of an application would serve the public interest, convenience and necessity.<sup>106</sup> In *Hall v. FCC*, 99 U.S. App. D. C. 86, 237 F. 2d 567, this Court reversed a Commission order for applying an improper standard to this aspect of an applicant's conduct and held that it was error not to consider as a misrepresentation the applicant's declaration of an intent to do something when, in fact, he did not have a fixed intention but was undecided, 99 U.S. App. D. C. at 95-96, 237 F. 2d at 576-577. We believe that, similarly, the Commission in this case failed to hold applicants to the required standard of candor by disregarding misstatements on issues of major importance.

The proper standard of candor is of critical importance here, because of the pivotal role which the personal representations and assurances of the applicants' principal officers have assumed. In its Opinion and Order of December 21, 1966, the Commission placed heavy reliance upon "first-hand knowledge of the testimony and representations of the parties" as expressed in the statements of their principal officers (R-87, ¶ 12), and upon their "express, positive and binding representations as to future conduct" (R-87, ¶ 38).<sup>107</sup> The decision of June

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<sup>106</sup> See brief for the Federal Communications Commission in opposition to certiorari in *Immaculate Conception Church v. FCC*, No. 407, Oct. Term, 1963, p. 17, certiorari denied, 379 U.S. 904. "The Commission . . . is in the position of having to rely in its regulatory functions upon full and frank disclosure by its licensees and accordingly must require complete candor on their part" (*WHDH, Inc.*, 22 FCC 767, 880, 13 Pike & Fischer R.R. 507, 585). This is such a vital aspect of licensee conduct that a willingness to deceive the Commission is sufficient for denial of an application regardless of the materiality of the matters involved (*FCC v. WOKO, Inc.*, 329 U.S. 223, 227; *Immaculate Conception Church v. FCC*, 116 U.S. App. D.C. 73, 320 F. 2d 795, 796, certiorari denied, 375 U.S. 904; *Hall v. FCC*, 99 U.S. App. D.C. 86, 94-6, 237 F. 2d 567-577.

<sup>107</sup> More specifically, the Commission in its first opinion relied upon the "unqualified representation" that neither company engages in reciprocity (¶ 21); the "multifold" and "positive assurances," which were "reiterated and elaborated," that ABC would be sub-



22, 1967, after the evidentiary hearing, plainly rejects the testimony of applicants' presidents in two vital respects—by finding that ITT companies are not substantially autonomous (R. 5307, ¶ 40), and by refusing to accept the claim of dire consequences to ABC if the merger were denied (R. 5319-21, ¶¶ 67-70). Nevertheless, the Commission accepts at face value representations as to the parties' future activities in UHF (R. 5305-7, 5321-2, ¶¶ 36-38, 71-72), the "explicit representations and assurances" that ABC would be autonomous in regulatory and commercial situations and that reciprocal dealing would not be practiced (R. 5308-10, 5315, ¶¶ 43, 44, 57), and the "solemn assurances of the principals" as to the autonomy and integrity of ABC's news and public affairs activities (R. 5324-6, ¶¶ 78-81). These findings are gravely undermined if, as we believe, the applicants' principal officers have not comported with the standard of candor and completeness required in this proceeding.

In its decision below, the Commission specifically dealt with only one example of such inadequate conduct. ABC's president, in the September 1966 hearing, testified incorrectly that the company was limited to borrowing up to 50% of assets by a provision in its loan agreement with Metropolitan Life, giving it a borrowing "latitude" of only \$6 million (Tr. 567-8). This statement is admittedly incorrect (J297, R. 3660-80; Tr. 1330). The Commission concludes that it is satisfied that, in making the statement, ABC's president "could have reasonably believed" it to be correct, and "cannot properly be found to have set out deliberately to deceive the Commission"

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stantially autonomous and independent after the merger and that its news judgment would not be influenced by ITT (¶ 22, 26); ITT's "unqualified commitment" of at least \$50 million in financial support that ABC could not otherwise anticipate (¶ 28); ITT's declared interest in UHF advancement (¶ 29); the "assur[ance]" that ABC would "remain free" to take an independent position before the FCC and other forums (¶ 31); the "explicit and emphatic assurances," found to be "positive, credible and persuasive," that ABC's broadcast programming activities generally will not be adversely influenced as a result of ITT's other interests (¶ 36).

(R. 5327, ¶ 82, fn. 8). But the Commission does not justify or even discuss the failure of ABC to bring the error to the FCC's attention, after ABC's president became aware of the true terms of the loan agreement, the day of the September hearing or very shortly thereafter (Tr. 1467-8, 1585-6, 2454-5); as a result, the Commission's first opinion explicitly, and mistakenly, had relied upon a supposed limitation in the loan agreement as a basis for ABC's financial need (R-87, ¶ 24).<sup>108</sup> In any event, the standard applied by the Commission is erroneous as a matter of law. The regulatory requirement is not satisfied by the absence of deliberate fraudulent intent. An applicant is expected to be forthright, frank and complete, and this Court reversed for failure to apply such standard in the *Hall* case, *supra*.

The Commission does not discuss any other aspect of the record below on this point, dismissing the allegations as involving "relatively minor aspects of the testimony and proceedings," and as attributable to "partisan spirit" (R. 5327, ¶ 82). It is obvious that the 50% debt limitation was a critical aspect of the Commission's decision in 1966. The same is true of the other matters urged below; and it is highly important that most of these incorrect or misleading incomplete statements by applicants' principal officers were made in the September 1966 hearing at a time when there was no adversary context and when the Commission had to rely upon their truthfulness for the facts.

<sup>108</sup> The Commission then found: "Commitments made under existing loan agreements limit further borrowing by ABC to \$6 million" (see also the dissenting opinion of Commissioner Johnson, pp. 60-1).

In its second decision, the Commission cited as the basis for Mr. Goldenson's reasonable belief the statement of a Metropolitan Life official that ABC was approaching a high loan level (R. 5327, ¶ 82, fn. 8). But this official made clear that Metropolitan has never had occasion to determine the maximum amount which it would lend ABC (or which it would allow ABC to borrow from others), and that it would entertain a further request from ABC at the present time (Tr. 1324, 1328, 1332). The record is also clear that ABC never investigated with Metropolitan the actual extent of its borrowing power (Tr. 1468, 1470).

Thus, in the September 1966 hearing, ITT's president, Mr. Geneen sought to minimize ITT's interest in entry into broadcasting and in the field of CATV, apart from the proposed merger. He stated that ITT had some "general," but fruitless, conversations "with people who purported to think we should get into stations" (Tr. 592), and it was also represented that ITT had "some very small CATV experimental operations," that it had "lent money to six separate CATV entrepreneurs" (Tr. 121-2, 516). These statements misleadingly depicted ITT's interest in broadcasting as a passive recipient of proposals and its interest in CATV as simply a lender with an interest in "experimental" operations, contrary to the fact established at the subsequent evidentiary hearing (*supra*, pp. 6-7, 53-54, 62-63).<sup>100</sup>

Second, on the critical issue of ABC's autonomy after the merger, Mr. Geneen declared in the September hearing that this would be required in any event by "the ITT management system of substantially autonomous subsidiaries", that ABC in that respect "won't be a lot different than" the other ITT entities (Tr. 165-7, 503), and that "the ITT management system of substantially autonomous subsidiaries will enable, and, in fact, require both [ABC and another ITT company with conflicting interests] to present their separate views to the Commission" (Tr. 172). It is now clear—and the Commission so finds—that the proposed ABC status within ITT would be very different from that of other ITT companies and that if it remains autonomous, ABC would be an incongruous "unique" entity in the ITT management system (*supra*, pp. 87-88). This disclosure, had it been candidly made in September 1966, would have prompted

<sup>100</sup> To refer to an analogous statutory standard epitomizing the duty of completeness of disclosure, broadcast licensees and applicants are required not only to avoid "any untrue statement of a material fact", but also "any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." (Cf. Section 17 of the Securities Act of 1933, 15 U.S.C. 77q; Section 10(b), 15 U.S.C. 77j(b)).

close scrutiny of the parties' representations regarding ABC's future independence.<sup>110</sup>

As to ABC, in addition to the 50% borrowing restriction discussed above, ABC's president, Mr. Goldenson represented to the Commission in July and September 1966 that ABC's need for merger was shown by its "already known and planned" capital requirements of "approximately \$90.0 million for constructing and equipping new studio complexes to be built in New York and Los Angeles, as part of our long range plan" (R-23, letter of July 25, 1966, p. 3; Tr. 97); and he has since asserted that this was a plan intended to be fulfilled immediately within five years (Tr. 1531, 1540). The supplementary hearing disclosed that at the time of these representations, the only actual plan under consideration was a Hollywood expansion estimated at \$12,464,000 (AR12, R. 224-8; AR45, R. 963-1143). Almost one-half of the \$90 million amount, \$40 million, was based upon a tentative estimate for construction of New York facilities under a plan which ABC had completely rejected early in July 1966 and it had taken no affirmative steps to develop an alternative plan when the representations were made (AR15, R. 253-4; AR19, R. 288-9; Tr. 1532-6, 2394-5, 2397-01, 2519, 2108).<sup>111</sup> Consequently, the

<sup>110</sup> In addition, on the material issue of ITT's financial commitment, Mr. Geneen told the Commission in September 1966 that "in principle" the ITT board had specifically endorsed the \$50 million commitment which he had stated to the Commission (Tr. 570-1). In the subsequent evidentiary hearing, Mr. Geneen further stated that the board's endorsement was reflected in its minutes for October 12, 1966 (Tr. 2021-3); and ITT thereafter presented a legal opinion purporting to support Mr. Geneen's interpretation of the minutes, an opinion which was rendered three days after Mr. Geneen's testimony at the supplementary hearing by the firm representing ITT at the hearing (AR81, R. 1485). Perusal of the minutes, subsequently offered for the record, discloses a report by Mr. Geneen and the company's general counsel, but no board action or endorsement in terms of a financial commitment (AR82, p. 12, R. 1508).

<sup>111</sup> As to the remainder of the \$90 million, a sum of \$33 million, claimed to be for renovating and equipping properties, had no backup whatever (Tr. 2540); and \$5 million rested solely upon

representation that ABC had "already known and planned" to undertake a \$90.0 million expansion program when it had no such fixed intention, and indeed had no plans of substance, is a misstatement of the kind condemned in *Hall v. FCC, supra*.

Second, in the supplementary hearing, Mr. Goldenson sought to prove ABC's disadvantage due to a smaller coverage by primary affiliates by representing that the "difference of five percent in coverage means in daytime and nighttime probably \$72 million to \$73 million of revenue for the year '66 alone" (Tr. 1476); and by dismissing clearances on secondary affiliates as unimportant because of the small audience ABC would get for its shows "at 12:00 midnight or early in the morning" (Tr. 1619). These representations as to ABC's alleged coverage problems were contradicted by evidence subsequently obtained for the record.<sup>112</sup> We do not believe they may be excused as hyperbole or dramatic license. The

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"discussions" concerning a technical center in Hollywood, for which no plans were available (Tr. 2391-4). It was also shown that ABC originally intended to put off any action on plant expansion until after it completed colorization of its existing facilities (Tr. 1539-40) and that in April 1966 it foresaw that such colorization would take until about April 1970 (J2, R. 1571).

<sup>112</sup> The alleged revenue gap of \$72-73 million was derived from computations on an ABC document, AR63, Att. A, R. 1273-4. Its author admitted that the document does not distinguish between the effect of program popularity and the effect of coverage and that, therefore, it does not show revenue loss attributable to ABC's smaller number of primary affiliates (Tr. 3438-40, 3058). The exhibit arrives at its conclusions by computing the additional revenue obtainable if ABC had attained the same audience as the average of CBS and NBC; by the same computation, it could be shown that CBS suffered from a substantial revenue gap as compared with NBC (Tr. 3506-7, 3531-3), an absurd conclusion.

As to the value of secondary clearances, AR65 shows that ABC obtains a substantial number of secondary clearances at the scheduled prime time; and that most of its delayed clearances were during prime-time hours, or adjacent thereto. No clearances resulted in the broadcast of ABC's primetime programming at midnight or 1:00 a.m., with the exception of a few clearances for feature films which began during prime time but extended into late nonprime time hours. (See AR65, R. 1284-1308; Tr. 3041).

Commission was entitled to frank and accurate statements concerning ABC's coverage problems from the applicant's president, without having to await detailed analysis of underlying data.

Finally, at the supplementary hearing, Mr. Goldenson asserted that if the merger were not approved, ABC would "probably stop our forward progress of our East Coast and West Coast facilities" (Tr. 1665); it "would have to give serious consideration to cutting back in our news, in our radio network, and any other loss areas" (Tr. 1667); it "would have to cut salaries or eliminate personnel," and it "might even have to give consideration . . . at an early stage" to dividends (Tr. 1667). Mr. Goldenson was pressed by the Chief Hearing Examiner to explain why he had not testified to these consequences in the September 1966 hearing before the Commission, when he had indicated only that, with ITT resources, ABC "would then be able to accelerate our growth to the extent of at least three years in advance of what we otherwise would be able to do" (Tr. 567-8). Mr. Goldenson's explanation was: "I wasn't asked" (Tr. 1696). The exaggerated consequences claimed by ABC's president are utterly unsubstantiated on the record and the Commission itself has declined to accept them as credible.

In sum, the record demonstrates a serious lapse from the level of candor required of the applicants. This of itself must weigh against the pending applications. It has a further impact here. We have urged, on the basis of regulatory and antitrust principles, that the potential consequences of this transaction should be appraised in the light of the probable results of the relations between ITT and ABC, considering the structure of the industry and the economic and other incentives which the merger will produce, and that substantial consideration should not be given to countervailing promises and representations. The lack of candor of the applicants' principal officers prevents the Commission from making findings that their promises and representations can mitigate or obvi-

ate the adverse effects which would otherwise be likely to result from the proposed merger. The Commission erred in failing to give due consideration to this factor in determining the public interest.

### CONCLUSION

For the foregoing reasons the Commission's orders authorizing the assignment and transfer of broadcast licenses from ABC to ITT should be reversed and set aside.

Respectfully submitted.

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September 1967



## APPENDIX

FCC LETTER ON UHF TUNING, JULY 24, 1967  
IDENTICAL LETTERS SENT TO ADDRESSEES  
(LIST ATTACHED HERETO)

Mr. Ross D. Siragusa

July 24, 1967

Chairman

Admiral Corporation

3800 W. Cortland Street

Chicago, Illinois 60647

Dear Mr. Siragusa:

At recent meetings of the Committee for the Full Development of All-Channel Broadcasting, discussions were held on the subject of ease of tuning UHF-TV stations as compared to VHF.

The preponderance of all-channel receivers in use today have a "UHF" position on the principal tuning knob and a separate UHF station tuning knob. Hence a two-step procedure is generally necessary to obtain UHF reception while VHF tuning requires but one. The exception is the case where only one UHF station is receivable and the UHF tuner is not varied by the viewer.

From this it is apparent that UHF tuning is more complicated than VHF tuning and further that the advantages of remote control are not being applied to UHF reception.

When the Commission considered the standards to be applied for all-channel receivers, in Docket 14769, it stated in its Notice of Proposed Rule Making that the industry had advised the Commission that easy tuning "push-button, as well as other means of tuning, will be actively pursued." This was in 1962.

It appears that unless something is done promptly to end the disparity in ease of tuning, many receivers with a permanently built-in UHF deterrent will be purchased by the public.

I would appreciate your comments and an indication of any plans you may have for correcting this unfortunate trend.

This letter was adopted by the Commission on July 5, 1967.

BY DIRECTION OF THE COMMISSION

(Signed) ROSEL H. HYDE  
ROSEL H. HYDE  
Chairman

cc: Electronic Industries Assn.

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# BRIEF FOR INTERVENORS

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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No. 21147**

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UNITED STATES OF AMERICA, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE  
INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,  
AMERICAN BROADCASTING COMPANIES, INC., and ABC TELE-  
VISION AFFILIATES ASSOCIATION, INTERVENORS

---

**On Appeal from the Federal Communications Commission**

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United States Court of Appeals  
for the District of Columbia Circuit

OCT 5 1967

*Nathan J. Paulson*  
CLERK

## STATEMENT OF QUESTION PRESENTED

In the opinion of the intervenors the question presented is whether there is a rational basis in findings supported by substantial evidence for the Commission's determination that the public interest, convenience and necessity will be served by the transfer of ABC's broadcast licenses to a subsidiary of ITT because the financial resources and technological competence to be provided by ITT will result in public benefits that will outweigh the alleged adverse effects projected by the Antitrust Division of the Department of Justice.

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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21147

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UNITED STATES OF AMERICA, APPELLANT

*v.*

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,  
AMERICAN BROADCASTING COMPANIES, INC., and ABC TELE-  
VISION AFFILIATES ASSOCIATION, INTERVENORS

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On Appeal from the Federal Communications Commission

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**BRIEF FOR INTERVENORS**

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**Counterstatement of the Case**

International Telephone and Telegraph Corporation and American Broadcasting Companies, Inc. (hereinafter "ITT" and "ABC") rely upon the statement contained in the brief for the Federal Communications Commission (hereinafter "the Commission") for a summary of the proceedings and decisions below.

## Summary of Argument

### I

The Commission did not err in its appraisal of the alleged anticompetitive consequences of the merger. The Antitrust Division of the Department of Justice (hereinafter "the Division") admitted on December 20, 1966 in a letter to the Commission that the alleged anticompetitive consequences on which the Division relies were "sufficiently speculative" that the Division did not then intend to sue under the antitrust laws to enjoin consummation of the merger. The alleged effects are no less speculative today. Thus the Division asked the Commission and now asks this Court to accept arguments that are too weak to support a suit under the antitrust laws.

The Commission properly found that ITT is not a potential independent entrant into the relevant market of national television network broadcasting. The Division's prophecy that ITT would begin by buying one or more broadcasting stations, would thereafter acquire a group of stations, and would then move on to become a nationwide television network operator was entirely speculative and unsupported by evidence.

The Commission also properly rejected the Division's argument that ITT was a potential entrant into the national television network market because it might become a substantial participant in CATV or pay-TV operations and then at some future time through these operations develop a nationwide television grid. That argument required a long chain of speculation and assumed the solution of technical, legal, regulatory and economic problems whose future solution cannot now be foreseen or predicted.

The Commission rightly determined that the merger would not have anticompetitive consequences upon the development of communications technology. An abundance of evidence supported the Commission's conclusion that the



merger will instead promote the public interest by enhancing broadcasting communications technology, which promises to benefit not only network broadcasting generally but also ABC, the only television network now lacking technological support. The Division's claim of anticompetitive consequences rests on mere speculations, in contrast to the realistic and substantial benefits found by the Commission.

There was no basis in fact for the Division's argument that the merger would have an adverse effect upon competition in television advertising. The evidence showed that ITT has a declared policy against reciprocity and that neither ABC nor ITT has ever engaged in that practice.

In appraising these speculative contentions of the Division the Commission did not err as a matter of law or otherwise by considering and giving appropriate weight to the testimony of ITT officials, or by considering its own regulatory policy. The Commission's findings are sufficient in form and well supported by substantial evidence. The Division's attack upon the findings is in part merely an attack upon the wisdom of the Commission's regulatory policy and in part an attempt to try *de novo* the inferences and conclusions that the Commission drew from basic facts that are not in dispute. These are arguments that the courts have held are not admissible on judicial review. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620, 621 (1966); *Illinois Central R.R. v. Norfolk & Wn. Ry.*, 385 U.S. 57, 69 (1966).

### II-III

The Commission gave careful consideration to, and made adequate findings in disposing of, the Division's argument that the merger would adversely affect the quality and public service character of ABC's broadcasting activities. The Commission found that the character of these activities would be preserved and that ABC's integrity and independence in the presentation of news and public affairs programs would not be impaired. In making this finding

the Commission gave appropriate weight not only to ABC-ITT proposed internal arrangements (which was consistent with its established practice in analogous matters) but also to the fact that ITT's self-interest and the competition of other news sources would impel it to conduct a news operation that was consistent with traditions of journalistic independence and integrity.

The Division's attack on these findings of the Commission rests in large part on the assertion that ITT should be conclusively presumed to be unfit to receive a broadcasting license because of its extensive foreign business interests. The Division itself abandons this assertion in arguing that ITT should be regarded as a potential entrant into national network broadcasting; in that argument the Commission asserts that ITT is qualified in every respect to operate a network system. In any case the Commission was justified in declining to adopt the regulatory policy advocated by the Division. Any such policy would have been inconsistent with the Commission's prior experience and policy in administering its licensing powers, would have been arbitrary and unreasonable and, unless devised and applied solely for the discriminatory purpose of disqualifying ITT alone, would have involved the Commission in grave administrative and regulatory problems. The Commission carefully reviewed all of the evidence and gave reasoned consideration to the Division's arguments relative to conversations between certain ITT representatives and newspaper reporters during the proceedings. Those same arguments now made to the Court invite the Court to reweigh this evidence and to substitute the Division's opinion of its significance for that of the Commission. Courts have consistently refused to engage in such a practice when reviewing agency orders.

The Commission properly evaluated the Division's argument that the application should be disapproved because ABC might be eliminated as an independent participant in regulatory proceedings. The Commission determined that there was substantial evidence that ABC's independence in

regulatory proceedings would not be adversely affected and that, even assuming otherwise, there would be no substantial impact upon the public interest.

There is no infirmity in the Commission's findings on the alleged lack of candor and completeness on the part of the officers of the applicants. It considered all of the relevant evidence and its finding that the relatively minor aspects of the testimony and proceedings involved in these charges did not warrant any adverse inferences as to candor or character is clearly correct. The courts have held that the Commission's determinations on questions of candor and completeness should be upheld if they are not arbitrary and unreasonable. The Commission's determination here more than satisfies that standard because there was in fact no lack of candor and completeness upon the part of the officers of the applicant.

#### IV

The Commission's determination that the financial and technological strengthening of ABC would constitute a substantial benefit to the public interest is supported by substantial evidence.

The evidence showed that the costs of television programming and equipment are increasing and that public service programs are often the most expensive and least profitable. Evidence relating to ABC's history, its past and present financial resources and position, and its coverage of the television audience showed that the capacity of ABC effectively to discharge its public service obligations is less than that of the other two networks. The Commission's finding that ABC was faced with rising and substantial requirements for both capital and operating funds was supported by substantial evidence including voluminous and detailed schedules submitted by ABC which the Commission found to be reliable. In view of that finding and the evidence supporting it, the Commission was not required to make an ultimate finding stating the precise dollar amount of those

requirements. *Chicago & Northwestern Ry. Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 326, 345-7 (1967). Nor was the Commission required to make a finding that the only possible way that ABC could get access to financial resources was by merger with ITT. Under Section 310(b), the Commission was required to determine whether transfer of the licenses would in fact serve the public interest; it was not required to consider all conceivable alternatives and to determine that the proposed transaction was the only possible method of promoting the public interest.

The Commission was correct in finding that the merger would strengthen ABC technologically and thereby serve the public interest. The Division does not deny the capacity of ITT to make significant technological developments. There was ample evidence to support the Commission's finding that ABC would be strengthened by access to ITT's technology and manufacturing capacity and particularly that this access would enable ABC to develop and to make more use of UHF broadcasting. The Commission's conditions imposed on ITT and ABC were designed to assure that the applicant's representations with respect to UHF development would be fulfilled and were a proper exercise of the Commission's regulatory powers.

In conclusion, the Commission made adequate findings supported by substantial evidence, and its conclusions constitute an appropriate exercise of the regulatory powers delegated to it by Congress. The central thrust of the Division's attack is that this Court should go substantially beyond well recognized standards of judicial review and overturn the Commission's findings and conclusions because of the Division's own opinions on wise regulatory policy. The Commission's decision being based upon adequate findings and substantial evidence and embodying no error of law should be affirmed.

## Introduction

On February 14, 1966, ABC agreed to merge with ITT. In this case the Division attacks the validity of an order of the Federal Communications Commission approving the transfer by ABC of seventeen broadcasting licenses to a wholly-owned subsidiary of ITT. The order was made under Section 310(b) of the Communications Act of 1934, 47 U.S.C. § 310(b), which provides that no station license shall be transferred except upon application to the Commission and upon a "finding by the Commission that the public interest, convenience, and necessity will be served thereby."

The Commission held two hearings on the application and after each hearing found that the public interest, convenience and necessity would be served by the transfer. Because the seventeen broadcasting stations involved are a part of the ABC national radio and television networks and because the transfer of the licenses is a step in the merger of ABC and ITT the Commission's consideration went "far beyond the scope normal in transfer proceedings" (R-87, ¶ 17)<sup>1</sup> and included the question whether the merger itself, appraised in terms of ABC's network operations, would serve the public interest.<sup>2</sup>

The Commission held that in deciding this question it should weigh or balance the detriments and the benefits of the merger to the public interest. It did so and found that "the benefits to the public interest flowing from the proposed merger clearly outweigh any detriments to the pub-

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<sup>1</sup> Intervenors have adopted the Division's method of citation of the record. See Division Brief (hereinafter "Brief") p. 2 n. 1.

<sup>2</sup> In its first report the Commission said (R-87, ¶ 17):

"If this proceeding involved no more than the transfer of control of the 17 broadcasting stations, the record would be more than ample to sustain approval. However, the focus of attention of both the Commission and the applicants has been on the significance of control of the network. We are mindful that this involves jurisdictional problems. \* \* \* We have considered this matter without regard to any jurisdictional limits and we merely note that we leave the limits of our jurisdiction over networks for future consideration."

lic interest that may be potential consequences, including those that have been so exhaustively explored in the record of the present proceeding." (R. 5330, ¶85). The Division contends that the Commission erred in this appraisal of the public interest, that it did not strike a proper balance between the benefits and detriments of the merger and that its order therefore should be set aside.

There are a few general observations with respect to the character of the issues that are raised by the contentions of the Division that may appropriately be made here as an introduction to our argument.

The Division does not suggest that the orders of the Commission will or can interfere in any way with the authority or capacity of the Division to discharge its own statutory and administrative responsibilities. The Commission's order confers no immunity upon the companies and the Division is therefore free at any time to institute suit under the antitrust laws to enjoin consummation of the merger. *United States v. RCA*, 358 U.S. 334 (1959) Whatever the outcome of this appeal the Division will remain free to prosecute under the antitrust laws any actions it deems appropriate.

The Division is here simply because it disagrees with the judgment of the Commission that the public interest will be served by approval of the transfer of the ABC licenses to a company owned by ITT. The stance of the Division in this litigation appears to rest upon the belief that in the final analysis it, rather than the Commission, is the guardian of the public interest in the administration of the Federal Communications Act. This notion is inadmissible. Congress has committed questions of regulatory policy to the judgment of the Commission. Its orders are, of course, subject to judicial review under the normal standards. But the fact that the Antitrust Division sues in the name of the United States does not change those standards or provide a basis for any suggestion that the views of the Division on questions of regulatory policy are entitled to more

weight than the judgments of the agency that Congress has authorized to decide those questions.

When this case is viewed in this light we believe that, despite the length and detail of the contentions made by the Division, the ultimate issues are not complex and, under the conventional standards of judicial review, should be resolved in favor of the validity of the Commission's action.

### A

The Division's Statement of Facts seems designed to leave the impression that a decisive issue in the case is whether the broadcasting operations of ABC are viable or profitable. The Commission's determination presents no such issue. The Commission did not rest its determination on the ground that ABC was a failing company or that its broadcasting operations, viewed in their entirety, were not profitable (R. 5315, ¶ 58). The Commission's findings were directed instead to the competitive disparity between ABC and the two other networks, to whether that disparity limited the capacity of ABC to provide a high quality national network service, and to whether ABC strengthened by affiliation with ITT would be better able to serve the public interest.

The Commission found that ABC was at a competitive disadvantage as against the other networks, that its television operations have been handicapped by this disadvantage, that the gap between ABC and the other networks has been increasing (R. 5316, ¶ 59), and that the competitive position of ABC today "is worse, in some respects, than it has been in the past" (R. 5319, ¶ 67). The Commission further found that "for many years" the Commission had been aware of the competitive disadvantage of ABC and referred to its past efforts to correct the situation (R. 5317-19, ¶¶ 63-66).

In determining that ABC was at a competitive disadvantage, the Commission properly gave consideration to the financial results of its operations as compared with those of the other two national networks. It found, for example,



that the ABC television network operation, which in 1961 had earned a pre-tax profit of \$4.7 million, had lost money every year since 1963, the loss in 1966 amounting to \$9 million. Between 1961 and 1966, the networking profit of NBC and CBS has risen from \$10 million to \$52.9 million, a five-fold increase in absolute terms and a tenfold increase in the profit disparity between ABC and its rivals. (R. 5316, ¶ 59). It also found that there had been no increase in the profits of ABC from all of its broadcasting activities, including its station as well as its network operations, in the last six years, although the overall profits of NBC and CBS had more than doubled. The Commission further found that all of ABC's broadcasting profit has been put back into the broadcast operation and that none of it has been used for payment of dividends, the servicing of loans or for other similar corporate expenses (R. 5316, ¶ 60). These undisputed facts, which are not referred to in the Division's Statement of Facts, are significant here because of their relationship to ABC's present and future capacity to discharge effectively its public service obligations.

In appraising that capacity, the Commission referred to the "tremendous and increasing cost of television programming and equipment," and to the fact that public service programs are often the most expensive and least profitable (R. 5317, 5319, ¶¶ 61, 62, 67). And the Commission found that because of its competitive disadvantage ABC is less able than its competitors to assume these burdens (R. 5319, ¶ 67). There was abundant evidence in the record, most of it undisputed, to support this finding. In this respect, the evidence relating to ABC's cash position was particularly significant. For example, in 1966 there was a net reduction in ABC's cash position of approximately \$61 million which was the result in large part of substantial expenditures for forward programming and for modernization of its broadcasting facilities. Despite ABC's record earnings and revenues in that year, these outlays could not be financed from ABC's cash flow (earnings plus depreciation) but necessitated outside borrowing in the amount of \$34 million (J270, R. 3531). ABC's cash flow projections

show that it faces a large cash deficit for each of the years 1967 through 1970 (AR3, R. 141).

The Division cannot soften the impact of the Commission's findings and the supporting evidence on this aspect of the case by pointing to the fact that ABC has been able to earn enough from its broadcasting stations to cover the deficit of its network operations, that in recent years its overall profits have been somewhat higher than for some earlier years, and that it has shown enterprise in its efforts to improve its competitive position (Brief, pp. 3-4). When all these circumstances are given due weight, the fact remains that ABC is less able to discharge its public interest responsibilities than its two competitors, and that, as the Commission found, the merger will significantly aid ABC in discharging those responsibilities. It was on this basis and not on any assumption that ABC was on the verge of bankruptcy or was conducting an unprofitable enterprise that the Commission determined that the public interest would be served if ABC were strengthened by the resources of ITT.

## B

The Commission's determination is not vulnerable to attack on certain grounds that are often the basis for reversal or remand of administrative orders. The Division does not and cannot suggest that the Commission disregarded or failed to consider any of the objections that the Division made to the merger. The Commission considered all of those objections and made specific findings relating to them. The Division makes no case that there is the slightest doubt about what the Commission did or its reasons for its action. The Commission's opinions state its "findings and conclusions, as well as the reasons or basis therefor, upon all of the material issues of fact, law, or discretion presented on the record." Section 8(b) of the Administrative Procedure Act, 5 U.S.C. §1007b.

The Division attacks the findings of the Commission and does so in terms that are designed to invoke conventional

grounds for judicial reversal. It asserts that certain of those findings are invalid because they reflect "improper criteria" or because they do not provide a "rational basis" for the Commission's decision. But analysis of these arguments shows that in fact the Division is asking the Court to go substantially beyond the accepted standards of judicial review and to overturn the findings simply on the basis of the Division's own opinions on wise regulatory policy. For example, the Commission found "that ABC will be significantly aided by having ITT's financial strength back of it, both in its competition with its network rivals and in its efforts to better serve the public interest through entertainment innovations, news and public affairs expansion" (R. 5329, ¶ 84(10)). The Division argues that this finding is invalid because the Commission did not find that ABC would not be able to obtain financial resources by some other method as, for example, by borrowing. This argument really amounts to an assertion that the Commission was mistaken in deciding that its regulatory purpose to enhance the capacity of ABC to serve the public would more likely be achieved if ABC had access to the financial resources of ITT than if ABC were required to depend upon outside financing. This is precisely the kind of administrative judgment that the courts have repeatedly said they will not disturb.

Similarly, although the Division attacks the Commission's findings on the conventional ground that they are not supported by substantial evidence, the attacks in reality are not directed to any important issues of basic fact but rather to the inferences or conclusions which should be drawn from those facts or to the weight that should be given to one body of evidence as against another. This infirmity in the Division's arguments is betrayed by the very terms in which they are cast. The brief abounds in charges that there was "erroneous disregard" of evidence or "erroneous reliance" on one kind of evidence as against another. In fact the Commission did not disregard any relevant evidence properly submitted for its consideration and committed no error in determining the relative weight to be

given to different bodies of evidence. The Division's arguments to the contrary tender the kind of evidentiary questions that the courts have consistently held they will not decide on review of an agency order. The very length of the brief of the Division and the detail with which it discusses the evidence demonstrate that its attack upon the Commission's appraisal of the evidence is an attempt to transform a petition for judicial review into a *de novo* proceeding.

In summary, the Division urges that the Commission failed to perceive the full measure of the anticompetitive consequences and the limitations on the integrity of ABC's operations that will result from the merger. It also purports to find in the testimony of the applicants' principal officers a lack of candor to which the Commission allegedly failed to give due consideration. We propose to deal first with these contentions and then to discuss the exceptions that the Division takes to the Commission's determination that there will be substantial public benefits from the merger by reason of financial and technological strength that ITT will bring to ABC.

## **ARGUMENT**

### **I. The Commission Did Not Err in Its Appraisal of the Alleged Anticompetitive Consequences of the Merger**

The Division's attack on the Commission's action rests in large part on criticisms of the Commission's findings dealing with the alleged anticompetitive effects of the merger (Brief, pp. 49-82). For reasons that we shall state in detail below we submit that the Commission's findings on each of the alleged anticompetitive effects are sufficient in form, supported by substantial evidence and provide a rational basis for the Commission's decision. The following comments, which apply generally to the arguments of the Division on the antitrust issues, are made as a preliminary to that detailed discussion.

In administering the Communications Act it is appropriate for the Commission to consider the probable competitive consequences of a proposed transaction, as it did here, but it is not required to regard antitrust objectives as the single or controlling test in applying the public interest standard of that statute. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93 (1953); *United States v. RCA*, 358 U.S. 334, 343, 351 (1959). Thus, the Commission may consider any possible adverse competitive consequences that follow from a proposed transaction, weigh those consequences against any benefits to the public interest, and then determine whether on balance the public interest will be served by approval. *Massachusetts Bay Telecasters v. FCC*, 104 U.S. App. D.C. 226, 235, 261 F. 2d 55, 64 (1958). See also, *McLean Trucking Co. v. United States*, 321 U.S. 67, 87 (1944); *Minnesota & St. Louis Ry. v. United States*, 361 U.S. 173, 187-88 (1959); *Florida East Coast Ry. v. United States*, 259 F. Supp. 993 (M.D. Fla. 1966), *aff'd*, 386 U.S. 8 (1967).

The Division pays lip service to these principles as it does to the established standards for judicial review. It asserts that the Commission did not employ "proper criteria" (Brief, p. 16) or "proper legal standards" (*Id.*, p. 49). But this rhetoric does not obscure the true basis of the Division's arguments. Its own words show that its basic complaint is that the Commission declined to accept the Division's notions of wise regulatory policy and particularly that it declined to defer to the Division's insistence that antitrust objectives should be given overriding importance. Thus in the introduction of its argument on the Commission's findings relating to the alleged anticompetitive consequences we are told that the Division disagrees "with the basic approach which appears to underlie the Commission's consideration of these issues" (*Id.*, p. 50); that the Commission failed "to appreciate and to give adequate weight to the importance of fostering additional network competition" (*Ibid.*); that the Commission erred in stressing the desirability of providing a greater degree of competitive equality between ABC and the other

two networks (*Id.*, pp. 50-51); that the Commission failed to recognize "the value of preserving aggressive innovative forces in CATV, pay-TV and in new forms of broadcast transmission" (*Id.*, p. 51); and that the Commission "can and should take action to enhance the potential for new entry" (*Id.*, p. 52). It would be difficult to contrive a series of propositions more precisely directed to questions of regulatory policy that Congress has authorized the Commission and not the Division to decide.

It should be observed moreover that in its arguments the Division does not accurately describe the Commission's attitude on the importance of competition. It charges the Commission with giving inadequate weight to the "importance of fostering additional network competition" (*Id.*, p. 50). In fact, the Commission carefully weighed the Division's argument that ITT might in the future independently enter the relevant market and concluded that the possibility was too speculative and unsubstantial to be given significant weight. But that does not prove that the Commission ignored or was indifferent to the significance of competition. On the contrary, it properly regarded the enhancement of ABC's competitive position as significant in relation to the public interest because, in the view of the Commission, that enhancement would enable ABC to discharge its public service responsibilities more effectively (R. 5307, 5315-22, 5329, ¶¶ 38, 58-72, 84(5)(9)(10)).

The Division is incorrect in imputing to the Commission the assumption that a network triopoly is desirable (Brief, pp. 50-51). The passage in the Commission's first opinion to which the Division refers is not directed to an issue of competition at all but rather to whether the Commission's long-standing policy of permitting diversified commercial enterprises to engage in broadcasting had produced satisfactory results (R-87, ¶ 40).

There is another aspect of the Division's arguments relating to the alleged detriments to competition which deserves comment here. Accepting the Division's own assumptions, some of these alleged adverse effects are mutually

exclusive, not cumulative, as the Division itself apparently recognizes (Brief, pp. 49-50). For example, the Division attacks the Commission because it failed to find that ITT was a potential entrant into standard network operation (*Id.*, pp. 52-60). It also argues, however, that the Commission should have found that absent the merger ITT would engage in substantial CATV or pay-TV operations (*Id.*, pp. 61-72). Yet the Division argues that a standard network operator has no incentive to engage in CATV or pay-TV operations (*Id.*, p. 62). If the latter assumption is correct it follows that ITT would not become both a standard network operator and a significant developer of CATV or pay-TV. The Division is doubtless entitled to make alternative and inconsistent speculations about the future operations of ITT absent the merger. But such speculations should be recognized for what they are. And it may be added that the failure of the Division to indicate either before the Commission or here which of the two alternatives it thinks more likely and therefore entitled to the greater weight is indicative of the highly speculative character of the Division's arguments.

This leads to one final comment on the Division's assertions with respect to the anticompetitive consequences of the merger. On December 20, 1966, the Division sent the Commission a letter commenting on anticompetitive consequences "that may possibly flow from an ITT-ABC merger". (App. A to December 21, 1966, dissenting opinion of Commissioner Johnson, R-87). That letter set forth all of the anticompetitive consequences that the Division now says require invalidation of the Commission's action. Yet in that letter the Division stated: "The possibilities of such anticompetitive consequences seem sufficiently speculative that we are not presently contemplating an action under the antitrust laws to enjoin consummation of the merger" (*Ibid.*). These alleged consequences are no less speculative today than they were when the letter was written.



**A. The Commission's Finding that ITT Was Not a Potential Independent Entrant into the National Television Network Market Is Supported by Substantial Evidence**

The Commission summarized its ultimate finding on the Division's contention that approval of the application would have the consequence of eliminating ITT as a potential independent entrant into national television network operations in these words (R. 5328, ¶ 84(1)):

"We have found that the relevant market for purposes of competitive analysis is the national television network market, and that since ITT was not a potential independent entrant into that market, its merger with ABC will not lessen or tend to lessen competition, actual or potential, in that market."

This finding was supported by ample intermediate findings. The Commission found (1) that ITT did not have any know-how or capacity in the relevant market; (2) that it had very limited relations with any of the customers in that market; (3) that it had no compelling reason or incentive to enter the market; and (4) that it had no intention of entering that market. The Commission also considered the structure of the market and found that ITT was aware that there were barriers to entry because of "the economic limitations of the demand for network advertising, the supply of network product or programming, and the technical limitations of network outlets" (R. 5298-5300, ¶¶ 14-18).

Each of these findings is supported by substantial evidence (Tr. 104-06, 591-92, 1197, 1439, 1678-79, 2026-27, 2644; J209, pp. 2-3, R. 2852-3; J219, p. 3, R. 2910; J238 (Roth Gerard section, pp. 3, 8-9), R. 3093-9; J239, R. 3135; J260, R. 3274). Indeed, the Division points to no direct evidence whatsoever that ITT, except for its interest in acquiring an existing network, has ever indicated any inclination or intention to enter the national television network market. Instead the Division argues along the fol-

lowing lines: It points to evidence that prior to its negotiation with ABC, ITT had shown an interest in acquiring one or more broadcasting stations. On the basis of this evidence the Division asserts that "it was a virtual certainty" that ITT would enter the broadcasting industry in some manner (Brief, p. 53), and that it would thereafter proceed to operation of a national television network. The highly speculative nature of the Division's first assertion is revealed by the Commission's evaluation of ITT's prior actions with respect to the acquisition of individual television stations: "Some tentative inquiries or approaches were made to station owners, but no determined negotiations for acquisition of TV properties were pursued by ITT until it began negotiating with ABC" (R. 5298, ¶ 14). This finding is fully supported by substantial evidence (Tr. 1013-23, 1060, 1105-06, 1109-11, 1816-22, 1824-29, 1831-35, 1889-92, 2598-2600, 2631-51; J144-J179, R. 2324-2405).

But even if the Division's first speculative assertion were accepted it would be of no avail without acceptance of the additional speculative assertion that ITT would proceed from ownership of broadcasting stations to operation of a national television network.<sup>3</sup> The Division argues that ITT would probably desire to acquire stations in "top markets"; that such stations would probably be unaffiliated, since the

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<sup>3</sup> The second step is essential to the Division's argument. Since it has conceded that the relevant market is the national television network market (Tr. 3947, 4280) the Division can show no adverse impact on the market merely by demonstrating the possibility that absent the merger ITT might have become the owner of individual broadcasting facilities. The Commission therefore correctly observed that "whether or not ITT might have entered the broadcasting field as the owner and operator of another group of television stations is not pertinent to the matter here under discussion" (R. 5299, ¶ 18). So far as concerns any impact on the broader market of broadcasting the Commission was also correct in stating that "no showing has been made how the substitution of ITT for some other group owner (such as Capital Cities, Storer, etc.) would result in any significant benefit to the public interest. The matter of benefit, if any, from such substitution of ITT for a present group owner would appear to be wholly speculative on this record" (*Id.*, n. 1).

existing networks own their own affiliates in these markets;<sup>4</sup> that ITT would therefore have great incentive to originate its own programming; and that the origination of programming would lead ITT into networking.

The Division is unable to point to any evidence in the record that supports this series of speculative assertions. In attempting to do so it refers to only two passages in the transcript (Brief, p. 54). Neither provides any support for the Division's assertions.<sup>5</sup> In contrast there was substantial evidence to support the Commission's rejection of the Division's speculations. There was evidence that ITT lacked know-how, capacity or experience in devising programs for network use (Tr. 591-92), and the Division does not even dispute these facts. There was substantial evidence that ITT had relations with only a few of the customers in the relevant market (J239, R. 3135; J260, R. 3274) and the Division does not contend otherwise. In addition, there was substantial testimony from the executives of ITT supporting the finding that it had no reason, inclination, incentive or intention to enter that market (Tr. 591-92, 1197, 1439, 2026-27).

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<sup>4</sup> The record is inconsistent with the Division's speculation that ITT would attempt to enter the "top markets" with an unaffiliated station. The three stations involved in ITT's tentative discussion were located in Hartford, Connecticut, Lansing, Michigan, and Knoxville, Tennessee. Each of the stations was a network affiliate (J160a, p. 1, R. 2378; J176, R. 2400; J179, R. 2403; TV Factbook, p. 29-a. (1967 ed.)) and none of them was located in a top market where the networks operate their own station (TV Factbook, pp. 78-a, 83-a, 88-a (1967 ed.)).

<sup>5</sup> The Division cites certain testimony by Mr. Goldenson, but he did not testify that group owners of television stations were likely to enter networking. He testified merely that he could think of other existing group owners who would have to be considered more likely entrants than ITT (Tr. 1679-81, 1692). And contrary to the Division's implication, Dr. Goldin did not testify that group owners have an incentive to start a network. Instead he stated that the economic health of the network should not be viewed in isolation from the support it gets from owned and operated stations (Tr. 3034-37, 3077).

This evidence, read in the light of the entire record, provides substantial support for the Commission's finding that ITT was not a potential entrant into the national television network market. On any view of this evidence it is clearly more substantial than the Division's speculations which were not evidence at all but simply argument. The Commission's finding was thus based on a record in which there was substantial evidence to support the finding and no substantial evidence inconsistent with it. Even had such inconsistent evidence existed the finding would have to be upheld on the basis of the Supreme Court's decisions holding that substantial evidence supporting the finding is sufficient to sustain its validity because the court will not substitute its judgment for that of the agency on the weight to be given to one body of evidence against another or on the inferences or conclusions to be drawn from the evidence. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620, 621 (1966); *Illinois Central R.R. v. Norfolk & Wn. Ry.*, 385 U.S. 57, 69 (1966).

With no evidence to support its speculations about the future conduct of ITT absent the merger, the Division attacks the Commission for having accepted testimony of ITT officials with respect to the company's intentions in relation to network operation.<sup>6</sup> It asserts that "in giving controlling weight to the testimony of company officials that they never contemplated entry into network broadcasting, the Commission applied an erroneous legal standard" (Brief, p. 56). This argument begins with a misstatement of the basis for the Commission's findings.

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<sup>6</sup> The Division cites three instances for the proposition that "there have been a number of recent cases in which companies, precluded from mergers by the antitrust laws, have independently entered markets in the face of the earlier statements of their officials that the company had no intention ever of doing so" (Brief, p. 57). The fact that three other companies operating in three totally different economic environments are alleged to have behaved in certain ways does not demonstrate that ITT would have behaved in a similar way if the Commission had disapproved the instant application.

The Commission in finding that ITT was not a potential independent entrant into the national television network market did not give "controlling weight" to the testimony of ITT officials on issues of subjective intent. The Commission gave weight to that testimony and committed no error in doing so, particularly because there was no substantial inconsistent evidence. But it did not rest its ultimate findings solely on the testimony of ITT officials. The Commission's findings that ITT did not have any know-how or capacity in the relevant market; that ITT had only limited relations with any of the customers in the relevant market; and that ITT had no compelling reason for entering the market do not depend upon testimony as to subjective intent but are supported by evidence which showed that ITT had no experience in the field of entertainment and programming; that the nature and extent of its relations with persons who are customers in the relevant market were not such as to give ITT an advantage in that market; and that ITT's present business operations were not of a character to create any compelling reason for entering the market, as for example a need for integration or a need to expand an already existing line of activity (Tr. 177-78, 591-92, 596; J238, R. 3043; J239, R. 3135; J260, R. 3274). And the Commission's finding with respect to the existing barriers to entry into the national television network market, i.e., limitations on demand, the supply of network programming, and the technical limitations of network outlets, is a finding of objective facts.

In disregard of these findings and of the objective evidence that supports them the Division argues that the Commission ignored the legal principle "that the status of a company as a potential competitor is to be determined not from subjective declarations of intent, but rather from the objective facts of the company's resources, capabilities, past patterns of development, and economic incentives in the particular field", citing without analysis *Federal Trade Commission v. Proctor & Gamble Co.*, 386 U.S. 568, 580-

581 (1967); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 174-175 (1964), and *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (See Brief, p. 56).

The Commission did not ignore these three decisions but carefully considered and analyzed them in paragraphs 9-12 of its second opinion (R. 5294-97). Nor as we have pointed out above did the Commission ignore the objective evidence relating to ITT's "resources, capabilities, past patterns of development and economic incentives."

The three cited cases provide no support for an argument that the Commission erred in considering testimony on intent and accepting it for the purposes of its fact-finding function. The most that can fairly be extracted from two of the cases, *Proctor & Gamble* and *Penn-Olin*, is that affirmative evidence of subjective intent is not necessarily *required* to establish that a company is a potential entrant into a relevant market. That point is not in issue here. But these two cases do not hold or even intimate that in determining whether a company is a potential entrant into a relevant market the trier of facts may not consider and give appropriate weight to testimony on intent. In its opinion in *El Paso* the Supreme Court did not discuss the relative weight that may be given to testimony on intent. There was no occasion for it to do so because the case did not turn on any such issue.

As the Commission's analysis of the three cases shows, the evidence in those cases on the potential entrants' activities, experience, capacity, know-how, and incentives, as well as on the structure of the market and the lack of barriers to entry, was substantially and significantly different from the evidence relating to those factors in this case (R. 5294-97, 5299, ¶¶ 9-12, 17).

The Division also criticizes the findings in paragraph 16 and a single related finding in paragraph 17 of the Commission's second opinion on the ground that they embody an "erroneous reliance on the alleged number of other

potential entrants" (Brief, pp. 58-60).<sup>7</sup> In this paragraph the Commission was responding directly to the request of the Division that the Commission find that "a company which owns and operates a group of stations in the major markets without network affiliations \* \* \* and which has the economic resources to do so, would be a likely potential entrant into networking" (Division's Proposed Findings, page 19, R. 4687, ¶ 1.27). The Commission's response was therefore directed to the question whether ITT was a potential entrant into the relevant market. The Commission specifically found that ITT was not a potential entrant into the national television network market. The Commission was therefore not required to make any finding on what the anticompetitive consequences of the merger might be if it were assumed that ITT were a potential entrant. Any argument that the Commission did not properly appraise the latter point is therefore directed to an issue that is not material.

The Division charges that paragraph 16 does not state the particular evidentiary facts on which the Commission rested its conclusion (Brief, p. 59). This is not correct.

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<sup>7</sup> Paragraph 16 (R. 5298-99) follows:

"The Department argues that a company which owns and operates a number of television stations in major markets without network affiliations, and which has the economic resources to do so, 'would be a likely potential entrant into networking'. Department Findings 1.27. It is known to the Commission, both from its own records and publications of which it takes official notice, that there are substantially more than one hundred so-called 'group owners' of television stations, many of which are companies of very substantial resources, some exceeding those of ITT, and which would be, by this test, 'likely potential entrants into networking'. See Television Factbook—1967 Edition No. 37, p. 109-a et seq.; Broadcasting 1967 Yearbook Issue, p. A-159, et seq. Without suggesting any inferences as to their competitive intentions or status, we note that group owners and operators of television stations include such companies as Avco, Capital Cities Broadcasting Company, Chicago Tribune-New York News, Chris-Craft Industries, General Electric Co., Westinghouse Electric Co., Cowles Communications, Hearst, Kaiser, Metromedia, Newhouse, Post-Newsweek, RKO General (General Tire & Rubber Co.), Scripps-Howard, Storer, Time-Life, and others."



Paragraph 16 deals with the precise evidentiary facts tendered in the Division's proposed finding. That proposed finding asked the Commission to draw an inference of potential entry from only two circumstances—ownership of a group of stations in major markets without network affiliates and economic resources. In response the Commission stated that there are a number of group owners of television stations, many with substantial financial resources and named sixteen such owners.<sup>8</sup> The Commission added that some of these owners had resources exceeding those of ITT. The Commission did not find that these group owners were in fact potential entrants into network operations but only that they could be so regarded if the Division's proposed finding were correct.<sup>9</sup> The Commission was justified in dealing with the proposed finding in terms of the two circumstances relied upon by the Division without making an extensive and detailed economic analysis of "the resources, capabilities and incentives" of other potential entrants (Brief, p. 59).

The Division presents its criticisms of paragraph 16 as if that paragraph contained the essential findings that support the Commission's determination that ITT was not a

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<sup>8</sup> The Commission was entitled to take judicial notice of its own records and to rely upon standard industry reference books to establish these facts. The size and resources of the corporations to which the Commission referred are matters of official notice. These attributes are shown in trade publications of which the Presiding Examiner took official notice (Tr. 730-31) and upon which the Division itself relied in its Conclusions and Brief before the Commission (See pp. 19, 21, 28, 29, 30. R. 4687-98).

<sup>9</sup> Contrary to the intimation of the Division, there is no inconsistency between the Commission's statement in ¶ 16 that it was suggesting no "inferences" as to the competitive intentions or status of the group owners named in that paragraph and the statement in ¶ 17 (R. 5299) that ITT was not even among the "dozen or more most likely entrants" (Brief, p. 59). In both instances the Commission was dealing with the matter on the assumption put forward by the Division, *i.e.*, that any group owner with substantial resources was a likely potential entrant. On that assumption the Commission was justified as regarding large existing group owners as more likely entrants than ITT which does not now own even a single broadcasting station.

potential entrant into the national television network market. There is in fact no infirmity in Paragraph 16, but it should be observed that its function in the Commission's report was simply to respond to one of several arguments made by the Division. The Commission's findings that are specifically directed to the status of ITT as a potential entrant are found elsewhere in its opinion. Those findings are articulated, represent an informed and reasonable appraisal of the evidence, and are supported by the record as a whole.

**B. The Commission's Judgment That the Merger Would Have No Substantial Anticompetitive Effects in CATV and pay-TV Is Reasonable, Well Within the Area of Its Discretion, and Supported by Substantial Evidence**

The Commission found that any anticompetitive consequences that the merger might have in the fields of CATV and pay-TV are "most speculative and therefore of at most a very slight nature" (R. 5328, ¶ 84(2)). This ultimate finding was fully supported by intermediate findings. In the first place, the Commission found "that the proposed merger has not deterred ITT from entering into CATV . . . ." (R. 5303, ¶ 27). The Commission also found that there was no evidence that a national CATV network would be technically or economically feasible. It also found that such a network would require Commission authorization and would run counter to established Commission policy. It further found that the development of any such network is uncertain because of copyright problems that may have to be solved by legislative action. Having noted these contingencies the Commission then stated (R. 5203, ¶ 27):

"In short, we have multiple contingencies in this respect, and when this is weighed with the consideration that there are other large firms eager and waiting to enter this area (see above para.), we find that the detriment to the public interest is so speculative as to weigh only slightly, at most, in the public interest determination to be made."

In paragraph 28 the Commission found that "[t]he record also fails to demonstrate that ITT had an interest in pay-TV which, but for the merger, might have led it to enter this field," and referred to evidence which it found demonstrated "that ITT was never seriously interested in pay-TV" (R. 5303).<sup>10</sup>

To relate its argument on CATV and pay-TV to the relevant market the Division must rely upon an even longer chain of speculation than is required by its argument concerning ITT's alleged status as a potential standard network operator. The argument on CATV and pay-TV rests upon the following hypotheses each of which is speculative but necessary for the Division's conclusion: (1) that absent the merger ITT would engage in nationwide CATV operations; (2) that it would then develop an interconnecting CATV grid permitting nationwide simultaneous transmission; (3) that future regulatory and congressional policy determinations would allow such transmission; (4) that ITT would engage in such transmission; (5) that ITT would then begin to originate its own programs; and (6) that the cable network carrying these programs, even though depending upon customer subscriptions, would meet with sufficient acceptance to be competitive with the three existing broadcasting networks.

The Division is unable to point to any decision under the antitrust laws which rests a finding of significant anticompetitive effect upon any chain of contingencies that is even remotely comparable to the one that the Division advances

<sup>10</sup> The validity of this finding of the Commission is not open to serious question. ITT had made no investment in pay-TV as it had in certain CATV operations. As the Commission properly noted in its findings the greater part of the evidence on which the Division relies to establish ITT's alleged interest in pay-TV was the result of the efforts of Arthur Levey to obtain financial backing for his pay-TV operations in which he had already lost \$1,000,000 (R. 5303, ¶ 28). There is no evidence that ITT ever seriously considered coming to Mr. Levey's rescue. The references in a staff report prepared in one of ITT's subsidiaries, which the Commission correctly characterized as a "think piece" (R. 5302, ¶ 26), are so speculative and remote from any specific or concrete business proposal that they provide no basis for questioning of the Commission's finding.

here.<sup>11</sup> The Division's argument on CATV and pay-TV is not grounded in any recognizable antitrust criteria, let alone in any recognized principle of administrative law. It rests simply on the Division's general notions as to the regulatory policy that the Commission should be required to adopt so that the broadcasting industry may be restructured in a way that the Division believes desirable.

In its findings on the speculative nature of the Division's contentions the Commission observed, as we have noted above, that Commission approval of a nationwide CATV network would require a change in the Commission's present policy as declared in its Second Report and Order, 2 FCC 2d 725 (R. 5302, ¶ 26).<sup>12</sup> The Division now contends that in this respect the Commission committed "error as a matter of law" because it improperly relied on "current regulatory policy" (Brief, p. 68).

The suggestion that an administrative agency is prohibited from recognizing and acting upon its own announced regulatory policy is so extraordinary that the Division is unable to support it by any reasoned argument or by any citation of relevant authority. It cites three cases, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964), *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), and cf. *United States v. Philadelphia National Bank*, 374 U.S. 321, 353, 371-372 (1963), and asserts that these cases establish "that the existence of regulatory review does not eliminate the competitive importance of preserving aggressive

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<sup>11</sup> As we have pointed out at page 16 above, the Division's argument on CATV and pay-TV is inconsistent with its argument on ITT as a potential entrant into network broadcasting because on the Division's own assumptions ITT would not enter both conventional networking and CATV or pay-TV.

<sup>12</sup> The Division appears to concede that the establishment of a competitive national CATV network is impossible under the Commission's present Rules and policies because the Commission has determined that CATV systems are only to be supplementary to free broadcasting rather than a competing service (Brief, p. 69). Under this policy, it will refuse to authorize CATV systems which would compete effectively with local UHF stations in the major markets by importing services not locally available on free-TV.

independent factors" (Brief, p. 68). These cases simply involved the judicial application of the antitrust laws and the courts did not lay down, even by implication, any rule of law governing the conduct of administrative agencies. What the cases in fact hold is that an industry is not immune from the application of the antitrust laws simply because it is, in one degree or another, subject to administrative regulation—a commonplace that is not even remotely relevant to the assertion that a regulatory agency is required by law to ignore its own policy.

In addition to its finding on the "multiple" objective contingencies, referred to above, the Commission also found "that ITT decided to curtail its CATV activities independently of the merger" (R. 5328, ¶ 84(2)) and supported this finding by the further finding: "We believe the evidence of record demonstrates that it was the problems which surrounded the CATV industry and not the possibility of a merger with ABC which led ITT, on November 2, 1965, to impose a freeze on new CATV commitments" (R. 5301, ¶ 23).

The Division attacks the findings relating to ITT's decision of November 2, 1965, on the ground that the Commission erroneously relied on the testimony of ITT officials (Brief, pp. 64-68). The opinion of the Commission shows that it considered all of the evidence tendered by the Division on this issue including the documentary evidence that the Division now cites in its brief (R. 5300-02, ¶¶ 21-25). The Division's assertion that the Commission did not explain its reasons for considering and giving weight to the testimony of ITT officials is incorrect. The Commission specifically referred to objective considerations including, among others, the copyright issue, problems in relation to pole rentals, the need for microwave grants subject to Commission regulation, and the Commission's regulatory policies, which in its judgment corroborated the testimony of the officials and supported a determination that the ITT decision

of November 2, 1965, was not prompted by the possibility of merger with ABC (R. 5301, ¶ 23).<sup>13</sup>

Here, as in the case of the Division's arguments on ITT as a potential entrant into broadcasting, the Division assumes that there is a rule of law that the Commission could not consider or give weight to the testimony of company officials on questions of intent or motive. That assumption should be rejected for the reasons that we have given on pages 21-22 above. The Commission in making the findings in issue committed no error of law. The arguments of the Division simply quarrel with the relative weight that the Commission gave to different parts of the evidence and with the inferences which the Commission drew from the evidence as a whole—evidence which the Division itself concedes "is conflicting" (Brief, p. 64). We have pointed out above that the courts have held that they will not set aside an agency finding on the basis of arguments of this kind. See *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620, 621 (1966); *Illinois Central R.R. v. Norfolk & Wn. Ry.*, 385 U.S. 57, 69 (1966).<sup>14</sup>

As we have pointed out, the Commission found that there were "multiple contingencies" implicit in the Division's argument that absent the merger ITT would at some time in the future engage in nationwide CATV operations competitive with standard broadcasting. It added that when these contingencies are "weighed with the consideration

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<sup>13</sup> The Division seeks to create the impression that the contemporaneous ITT documents were inconsistent with the testimony of ITT officials (e.g., Brief, p. 67, n. 2). The fact is that the contemporaneous documents fully support the testimony that objective considerations and uncertainties about CATV and not the ABC merger moved ITT to freeze its CATV project (e.g. J119, R. 2134).

<sup>14</sup> The Division also argues that it was error for the Commission to give any weight to the intentions of ITT in 1965 without considering that the management might thereafter change its mind (Brief, p. 67). The short answer to this contention is that the Commission explicitly recognized the possibility that ITT might change its mind and found that there were other contingencies, objective in nature, which made it speculative and unlikely that ITT would enter into CATV or pay-TV activities which could have any substantial competitive effect in the relevant market (R. 5301, 5303, ¶¶ 23, 27).

that there are other large firms eager and waiting to enter this area \* \* \* we find that the detriment to the public interest is so speculative as to weigh only slightly, at most, in the public interest determination to be made" (R. 5303, ¶ 27). The Commission's reference to other companies is supported by another finding in its opinion, based on its own records, that there are a large number of companies engaged in CATV that "are ready, willing and able to expand \* \* \* as fast and as far as they are permitted to do so by Commission regulations and orders and economic demand" (R. 5302, ¶ 26).

The Division attacks these findings, asserting that the Commission should have listed or identified the other companies and made findings comparing their incentives, financial resources, know-how and technological capabilities with those of ITT (Brief, pp. 70-71). The objection that the Commission should have listed or identified the companies is trivial. The Division does not deny that there are many companies engaged in CATV operations that have substantial resources,<sup>15</sup> nor does it assert that the identity of the companies is unknown.

In view of the infirmities in the case that the Division had made with respect to ITT the Commission was not required to set forth in its findings a detailed economic analysis of the resources and capabilities of each of these other companies. The Division offered no evidence that it was necessary for a company to have financial resources equal to those of ITT in order to engage in extensive CATV operations, no evidence that ITT's access to technology was in any sense unique, and no evidence that the companies now operating in the CATV field did not have access to technology and financial resources that would enable them to engage in nationwide CATV operations if they desired

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<sup>15</sup> In their proposed findings of fact the applicants specifically identified a number of CATV operators, including among others General Electric, RKO General, Inc. (General Tire and Rubber), Kaiser, Time-Life, Cowles Communications, Inc., Jerrold Corp. (ABC-ITT Proposed Finding 8.20, R. 4617).



to do so.<sup>16</sup> And the Division offered no evidence and makes no argument here that even suggests infirmities in the Commission's appraisal that the companies now actually engaged in CATV operations have the resources, incentive and the desire to expand their operations to the maximum extent permitted by regulatory policy and economic demand.

The Division's argument on this point rejects one of the essential functions of an independent regulatory agency. Congress creates such an agency so that by day to day exposure to the industry and through informed experience it will be in a position to resolve complex and specialized problems. If in dealing with speculative contentions about future economic conditions in the industry the agency may not draw upon all of the experience and knowledge that it has acquired in the conduct of its other regulatory tasks it would be stripped of one of its basic reasons for existence.

**C. Substantial Evidence Supports the Commission's Determination that the Merger Will Not Have Anticompetitive Consequences Upon the Development of Communications Technology**

The Division contends that integration of ABC and ITT will retard the development and application of technological innovations which would facilitate new entrants into network broadcasting. The Commission carefully considered this issue (R. 5303-07, ¶¶ 29-38) and, rejecting the Department's unrealistic speculations, concluded that the merger presented no detriment with respect to technology (R. 5307, 5328, ¶¶ 38, 84(3)). Rather, the Commission concluded on an abundance of evidence that one of the fundamental public benefits of the proposed merger will be the enhance-

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<sup>16</sup> Presumably even the Division would not seriously suggest that such companies as General Electric, RKO General (General Tire and Rubber), Kaiser, Time-Life and Cowles lacked the resources or capabilities to engage in extensive CATV operations. The Division makes the point that the revenues of Jerrold Corp. are not as great as the revenues of ITT (Brief, p. 71, n. 1), but there is no basis for its implicit assumption that the revenues of Jerrold are insufficient to enable it to engage in extensive CATV operations.

ment of broadcasting communications technology (R. 5304-07, 5328-29, ¶¶ 33-38, 84 (3-5) (11-12)). Its ultimate finding was:

“Consequently, with respect to this aspect of the case we conclude that the evidence permits no conclusion other than a benefit to the public interest, however viewed, from the proposed merger” (R. 5307, ¶ 38).

The Commission noted that much important work and significant technological advances have been the product of companies with broadcasting interests, citing both RCA and CBS with their extensive research and manufacturing facilities (R. 5304, ¶ 33). Observing that ABC was the only television network lacking such technological support, the Commission found that the merger of ABC and ITT would result in a company with both a substantial economic incentive and a proven capability to engage in the development and manufacture of improved broadcasting equipment of all kinds (R. 5303-07, ¶¶ 30, 33-38).<sup>17</sup>

There is substantial evidence to support the Commission's finding that the merger promises substantial technological advantages in the area of network broadcasting. The fact that both of the other networks have strong technological support and, in particular, the outstanding work of RCA in the broadcasting field, provide complete corroboration for the Commission's determination that the merger will significantly advance ABC's position in broadcasting through utilization of the substantial technological resources of ITT (Tr. 2316-23, 2404-05, 3990-93; AR43, pp. 23, 29, R. 890, 896; AR44, p. 34, R. 948; AR42, R. 865; R-23, p. 2). There is also substantial evidence that ITT would have the incentive to engage in technological develop-

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<sup>17</sup> We shall leave for more detailed consideration at pages 82-88, *infra*, the technological benefits resulting from the merger, including intensified development and use of UHF broadcasting, and primarily confine this section of the brief to a discussion of the anticompetitive consequences urged by the Division.

ments designed to strengthen the competitive position of ABC as compared with that of NBC and CBS.<sup>18</sup>

The Division contends, however, that these advantages are outweighed by what it terms the "disincentives" that the merged company will have with respect to the continued development of satellite transmission and nationwide cable systems (Brief, pp. 76-79). In essence, the Division's position is that the Commission should have required the public and the applicants to forego benefits that were immediate, substantial, numerous and realistic because of an apprehension, highly speculative in nature, that at some time in the future ITT, because of its stake in broadcasting, might decline to participate with full vigor in the development of satellite transmission or nationwide cable systems.

The Division does not, and cannot, urge that ITT is the sole possessor of any technology that is vital to these developments. The technology is well-known and capable of exploitation and development by many large and well-managed companies (Tr. 1715-6, 2257-59, 2264, 2866-7; J334, p. 197, R. 3815). Accordingly, there would be no significant anticompetitive consequence even if it be assumed that ITT would forsake these developments and devote its entire resources to network broadcasting. But this assumption, which underlies the Division's entire argument with respect to communications technology, cannot be taken for granted and, in fact, is wholly contrary to normal prudent business behavior.

While a merger with ABC will give ITT a substantial stake in broadcasting, it will not lessen the interest and position it presently has in cables, satellites, and other areas of communications technology. As a leading communications technology supplier, ITT will—as the Division's own witness Dr. Hill recognized—continue to have a strong in-

<sup>18</sup> R-23, p. 2; Tr. 1982-84, 2044, 2836-38, 2861-63, 513-14, 522-23, 584, 1941-53, 1988-89, 2060, 2314-15, 2322-23, 2403-06, 2721, 2726-28, 2737-38, 2747-49, 2779-80, 2790-91, 2833, 2842-47, 2851, 2855-57, 2863-65, 2868-74; J256, R. 3248; J262, R. 3362; J300, R. 3690; J324, R. 3735; AR42, R. 865; AR57, R. 1252.

centive in fields outside of network broadcasting (Tr. 1751-52, 1849a, 2047, 2859-62). The Division seeks to dilute the effect of this evidence by charging that it is not a "complete answer," and implies that at most ITT will merely "keep up" with advancing technology rather than pioneer (Brief, p. 77). In fact, it will have to, and will, press forward with developments in satellite-to-home transmission, national cable networks, and other broadcasting applications as they become commercially feasible and compatible with regulatory policy (Tr. 1849a, 2047, 2859-60).<sup>19</sup>

The plain fact, which the Division fails to recognize, is that no communications company, whatever its financial strength and technical capabilities, can resist new and improved technologies. Even if ITT and others heavily involved in network broadcasting were to stand pat and resist improvement, other companies would come forward promptly with advanced equipment.

But the real thrust of the Division's argument is that ITT's stated intentions cannot be relied upon because whatever the intentions and plans of ITT's management may be, it will in fact behave in the manner suggested in the Division's brief. It is thus apparent that in attacking the Commission's determination, the Division rests its arguments not upon evidence of record, but solely upon its own unwarranted assumption that ITT will have to sacrifice communications technology to network broadcasting.

As it does in the case of the Commission's consideration of the effect of the merger upon CATV and pay-TV, the Division challenges the significance attached by the Com-

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<sup>19</sup> The Division argues as if the obstacles to new and improved methods of broadcasting were entirely of a technological nature. The evidence is to the contrary. With respect to cable systems, as the Commission well knows from its various proceedings involving CATV systems and connecting microwave carriers, no great engineering development effort is required (See J334, p. 197, R. 3815; Tr. 2866). There is, however, an important and overriding economic obstacle since the broadcast receiver remains the least expensive method of getting a television signal into the home and is the only method economically possible for a large fraction of viewers (J334, p. 200, R. 3817).

mission to future policy decisions by the Congress and the Commission.<sup>20</sup> The Commission did not, as the Division suggests, justify the possible elimination of ITT as an innovator in communications technology on the ground that such innovations involve unsettled issues of legislative and regulatory policies (Brief, p. 80). As we have observed, the Commission did not accept the contention that ITT will be eliminated as an innovator in communications technology. Indeed, its view which has solid support in the evidence and in the history of such technology, was that ITT through its stake in broadcasting will have an increased incentive in all areas of communications technology. The significance of the unsettled issues of legislative and regulatory policy is that they are important factors to be taken into account in predicting the future of communications technology in the broadcasting area. The existence of such issues and the uncertainty as to when and how they will be settled contribute to the speculative nature of the apprehension expressed by the Division.<sup>21</sup> Certainly the Commission was fully justified in taking them into account in determining whether the Division's speculations as to anticompetitive consequences outweigh the immediate and substantial benefits that the merger of ABC and ITT promises in the area of communications technology.

The Division attacks the Commission for having noted that although ITT is a leader in satellite and communications fields, there are numerous other technologically ori-

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<sup>20</sup> We have discussed at pages 27-28 above the Division's contention that an administrative agency errs as a matter of law if it takes account of its own regulatory policies in appraising arguments that speculate about future conditions in the industry.

<sup>21</sup> For example, any satellite-to-home system would by-pass local stations and "undoubtedly would neglect local and sectional interests" (J334, p. 195, R. 3814). Such transmission would require the approval of the Commission (Tr. 2263, 1847a-48a, 2047), and to give approval the Commission would have to reverse its present policies protecting local community interests.

ented companies with substantial capabilities and resources who could, with sufficient market incentive, develop systems as well as ITT. The Division does not contest the existence of such companies and indeed its own witnesses identified a number of them which are engaged in domestic commercial satellite communications or communication-systems development, or both (J336, R. 3823; J337, p. 3, R. 3833; J339, p. 1, R. 3838; Tr. 1735). Nor does the Division deny that many of these companies have substantial economic resources. Instead, without disputing these basic facts, it resorts to the argument that the Commission erred because it did not embody in its opinion a detailed analysis of the resources and capabilities of these companies.

We submit that here, as in the case of the Commission's assessment of the merger upon the development of CATV and pay-TV, no such extensive analysis was required. The United States Government through its sponsorship of Comsat and in a variety of defense activities is heavily engaged in the area of satellite communication and other aspects of communication technology. The Commission itself in the discharge of its regulatory functions has accumulated a store of information relating to the activities of private companies in these fields, many of whom are Commission licensees (Tr. 1736). The private companies which the Division's own witnesses identified as being engaged in satellite and communication-systems technology include such well known names as AT&T, General Electric, Westinghouse, RCA, General Telephone & Electronics, Ford, Hughes Aircraft, Raytheon, Ling-Temco, TRW, Inc., Page (Northrop) and Collins Radio (J336, R. 3823; J337, p. 3, R. 3833; J339, p. 1, R. 3838; Tr. 1735). The suggestion, implicit in the Division's argument, that there is doubt about the technological capabilities and the resources of such companies does not deserve to be taken seriously. And its further suggestion that of all the companies in the United States ITT is so preeminent in communications technology that the future of that technology depends upon

rejection of the proposed merger does not come within any measurable distance of reality.<sup>22</sup>

In summary, the Commission's findings that the merger promises significant benefit rather than detriment with respect to the advancement of communications technology are fully supported by the record.

**D. There Is No Basis in the Evidence for the Division's Attack on the Commission's Finding That the Merger Will have No Significant Impact on Competition in Television Advertising**

The Commission found that "there is no likelihood that the merged ABC-ITT will employ reciprocity power to create any obstacles to competition in the television advertising market" (R. 5329, ¶ 84(7)).

The Division's attack on this finding is not based on the ground that either ITT or ABC has ever practiced reciprocity in the past or that the evidence establishes a reasonable probability that they will practice reciprocity in the future, but instead rests solely on the ground that the merger will create "a substantial opportunity for reciprocal dealing" (Brief, pp. 97-98).<sup>23</sup>

In support of its argument the Division asserts that the Commission's conclusion that there will be no adverse effect

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<sup>22</sup> For example, the evidence shows that in satellite-to-home transmission the main obstacle to further progress lies in the development of a larger and more expensive launching vehicle in order to carry the satellite-to-home transmitter which in turn must be more powerful and much heavier than the transmitter now in use for satellite distribution between stations (Tr. 2858-59; J339, p. 3, R. 3840). But ITT is not engaged in any phase of the manufacture of the critical item: launching vehicles (ITT Ex. 1, R-31). Thus the problem does not rest with ITT but with NASA (Tr. 2859).

<sup>23</sup> The Division does not assert that this alleged "opportunity" could have any impact on the national television advertising market as it now exists. Rather the suggestion is that "it could place serious obstacles in the way of the potential entry and viability of new competitors" (Brief, p. 98). The entire argument about the alleged "opportunity" is therefore directed to the hypothesis that at some time in the future there may be additional national broadcasting networks.



upon the television advertising market "is based upon its uncritical acceptance of the applicants' representations as to the autonomous operations of ITT companies" (Brief, p. 97).

This is not a correct description of the basis of the Commission's determination. While the Commission referred to the autonomous purchasing practices of the ITT companies (see AR1, R. 134; J260, p. 2, R. 3275) it also based its ultimate determination on two other findings.<sup>24</sup> One of these was that there was no evidence that either ITT or ABC has ever engaged in reciprocal dealings with suppliers and there was affirmative evidence that ITT has an established policy against such practices. These findings on matters of historic fact, not prophecy, are fully supported by substantial evidence (Tr. 329-30, 1970-80; AR1, R. 134; J260, p. 2, R. 3275; See AR4, R. 194) and cannot be seriously contested by the Division. In view of the fact that the Division through the use of civil investigative demands conducted a searching and widespread investigation of the business affairs of ITT and ABC, its failure to present any evidence of intent to engage in the practice of reciprocity is particularly significant.

The other relevant finding made by the Commission was that the only major suppliers of ITT who used substantial amounts of television advertising were General Motors, Ford, Chrysler, American Motors, duPont and Gulf Oil, that their television advertising expenditures exceeded the amount of their sales to ITT, and that the facts did not

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<sup>24</sup> The Commission referred to the decentralized character of ITT's purchasing operations for the purpose of showing that "by the very nature of the ITT method of functioning and organizing its business it would be difficult to accumulate the information necessary to learn where reciprocity power might be employed, and it would be difficult, at best, for any one subsidiary to exert any leverage by its individual purchases" (R. 5314, ¶ 55). The Division points to evidence which it asserts shows that the ITT subsidiaries do not always purchase on a competitive basis from outside companies (Brief, pp. 97, 87, 88). Without accepting the Division's characterization of that evidence it may be observed that it does not impair in any way the validity of the Commission's point which was that the nature of ITT's operations would make the practice of reciprocity difficult.

suggest that ITT would have any economic power to influence the television advertising of these companies. The Division cannot dispute the ultimate facts stated in this finding and it makes no argument that provides support for any suggestion that the Commission was irrational or arbitrary in concluding from those facts that ITT would not have the economic power to influence or to coerce the practices of those companies.<sup>25</sup>

The Division attempts to support its contention that the Commission was required as a matter of regulatory policy to disapprove the merger merely because it created an "opportunity" for the practice of reciprocity by reliance upon three cases that the Commission considered and discussed in detail in its opinion (R. 5312-13, ¶¶ 49-51). The Commission pointed out that in two of these cases, *FTC v. Consolidated Foods Corp.*, 380 U.S. 592 (1965) and *United States v. General Dynamics Corp.*, 258 F. Supp. 36 (S.D.N.Y. 1966), the unquestioned facts were that reciprocity was being pursued by an organized and, to some extent, effectual company program. In each case the record showed and the court found the existence of sufficient leverage over suppliers to compel reciprocity (R. 5312-13, ¶¶ 49, 51). The third case, *United States v. Ingersoll-Rand*, 320 F.2d 509 (3d Cir. 1963), was primarily concerned with the company's acquisition of a substantial share of the output of the relevant lines of commerce concurrent with its acquiring the broadest line of products in the overall market. Possible reciprocity was merely an additional consideration in deciding whether to grant an injunction pending trial on the merits— i.e., prior to submission of evidence on existence of actual leverage over suppliers (R. 5312,

<sup>25</sup> The Division is ill-advised to rely upon the incident involving General Dynamics and Shell disclosed in the record in *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 54-55 (S.D.N.Y. 1966) (Brief, p. 100 n. 93). In that case General Dynamics' purchases from Shell greatly exceeded Shell's purchases from General Dynamics. Thus, the court concluded: "Leverage potential was therefore present." Since in the present case the television advertising expenditures of ITT's suppliers exceed their sales to ITT (R. 5314, ¶ 54) the incident referred to in the *General Dynamics* opinion does not show that ITT would have any such leverage here.

¶ 50). Here the Commission found that, as opposed to the evidence in *Consolidated Foods* and *General Dynamics*, the record showed no basis for finding that ITT had the economic power over its suppliers to compel reciprocity in advertising. The Division's argument is based entirely on the bare possibility of reciprocity, but the Supreme Court has warned that "the 'mere possibility' of the prohibited restraint is not enough \* \* \* Probability of the proscribed evil is required. \* \* \* " *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965) (emphasis in original) (R. 5312, ¶ 49).

## **II. The Evidence Supports the Commission's Determination That the Merger Would Not Adversely Affect the Quality and Public Service Character of ABC's Broadcasting Activities**

In this Section of the brief we shall reply to the Division's contentions that the merger of ABC and ITT will (1) impair the independence and integrity of ABC's activities in the field of news and public affairs, and (2) adversely affect the public interest by eliminating ABC's independent role in regulatory proceedings. As a foundation for these contentions the Division argues generally that the Commission "erred in concluding that the merger will not affect ABC's autonomy because of the parties' representations and assurances" (Brief, p. 83). Because ABC's autonomy is significant only as it relates to alleged specific effects on the activities of ABC we shall discuss it in the course of our consideration of the first of the two issues stated above.

### **A. The Commission's Determination That the Integrity and Independence of ABC's Activities in the Field of News and Public Affairs Would Not Be Impaired Has a Rational Basis in Findings That Are Supported by Substantial Evidence**

In attacking the Commission's determination that the merger would have no adverse impact upon the integrity of ABC News, the Division argues that the Commission er-

roneously relied upon "internal ITT-ABC arrangements" (Brief, pp. 83-93, 106-109), while disregarding both the nature of ITT's foreign business interests (Brief, pp. 101-106) and the evidence concerning ITT's alleged efforts to influence news coverage of the Commission proceeding (Brief, pp. 109-113). The Division misstates both the basis of the Commission's decision and the consideration which the Commission gave to the evidence in reaching that decision.

**1. *The Commission's Findings Show That It Carefully Considered and Appraised All of the Factors Relevant to Its Determination***

The Commission's finding with regard to the continuing integrity of the ABC news operation is unequivocal (R. 5329, ¶ 84(8)):

"We have also found that the evidence is clear and convincing that the integrity and independence of the ABC news operations will be maintained as fully after the merger as it has been previously."

This ultimate finding is the result of a thorough inquiry in both Commission hearings and rests upon a broad array of intermediate findings which are supported by substantial evidence. Moreover, the finding is buttressed by the Commission's expertise; as the Commission observed, "[t]he area of broadcast reporting of news and public affairs is a field in which the Commission has experience and special competence and in which the Department has no special qualifications" (R. 5324, ¶ 78).

In its first opinion the Commission recognized journalistic independence as "the sine qua non of a reliable and healthy broadcasting service" (R-87, ¶ 30). The Commission stated that it was well aware of ITT's "extensive foreign investments," that it had "examined these foreign business interests in considerable detail" and that they had been "weighed carefully in our consideration of this mat-

ter" (R-87, ¶ 36). The Commission determined that its experience with other licensees having large foreign interests furnished "no evidence" that such interests influenced programming. The Commission found "no reason" to assume or even suspect that ITT would behave differently than these other licensees. Indeed, in view of ITT's prior "exemplary" record as an FCC-licensed common carrier, the Commission held that "we have much greater assurance in our judgment of ITT than is ordinarily the case with a new broadcasting applicant" (*Ibid.*). The Commission also received assurances from ITT with respect to ABC's broadcasting activities which were regarded as "positive, credible, and persuasive" (*Ibid.*). The Commission noted that less than 8 percent of ITT's stock was owned by aliens and that all of its officers and directors were American citizens. It concluded by finding that there was nothing in the history of ITT's operations abroad or in the United States that suggested "that it ever has been or would in the future be neglectful of its loyalties or responsibilities as an American company" (*Ibid.*).

The Commission's second opinion is not only fully consistent with the first, but also contains additional findings concerning the future independence of the ABC news organization. At the second hearing the Commission took extensive evidence with respect to the proposed intercorporate relationship between ABC and ITT. It found that this evidence reinforced ITT's prior "positive, credible and persuasive" assurances as to its relationship with ABC. The Commission also considered evidence relating to matters not depending upon representations as to ABC's autonomy. Thus, it found that the "tradition and ethics of journalistic independence and integrity, the competitive necessity of maintaining public confidence \* \* \*, and the check upon news integrity which other competitive news sources provide" all insured that the ABC network would continue to provide a fair and objective view of the news (R. 5326, ¶ 81).

The Division's response to the evidence that supports these findings is to ignore most of it and to charge that the Commission placed excessive reliance upon assurances as to ABC's future autonomy. We shall show below that the Commission's appraisal of ITT's plans for an autonomous ABC was entirely consistent with its decisions in other licensing cases and was not excessive or otherwise improper. We shall also show that the Commission fully considered and gave appropriate weight to the evidence which the Division offered to support its charge that ITT had attempted "to influence" the news relating to the instant proceeding.

And finally we shall discuss what we believe to be the Division's basic argument on the news issue, which is directed to ITT's foreign interests. We believe that the Division's heavy reliance upon this line of attack demonstrates the weakness of its position on the facts. In essence what the Division asked the Commission to determine as a matter of policy, and now asks this Court to decide as a matter of law, is that a company with extensive foreign business interests is unfit to be a broadcast licensee no matter what evidence is presented to demonstrate the company's fitness.

**2. *In Making Its Determination the Commission Did Not Give Excessive Weight to the Parties' Representations and Assurances Relating to the Autonomy of ABC and to the Integrity and Independence of News and Public Affairs Activities***

The Commission after appraising all of the evidence accepted the assurances of the applicants that ABC would be autonomous within the ITT organization and that the ABC news and public affairs activities would be conducted honestly and independently. These assurances and representations were not, however, the exclusive basis for the Commission's determination. It also relied upon external circumstances, including the historic independence of the ABC news organization within ABC, the tradition of journalistic independence and integrity, the existence of other competitive news services which provide a "check" upon

news integrity, and the fact that ITT in its own self-interest would be faced with the competitive necessity of maintaining public confidence in the integrity of the ABC news operation (R. 5325, ¶ 79).

The Division attacks the Commission for having relied on the representations and assurances of the applicants on two grounds. The first of these grounds is that the Commission in accepting the representations and assurances disregarded controlling "legal criteria" (Brief, pp. 84-86). The second is that the Commission did not give sufficient weight to evidence which the Division argues shows that ABC will not be autonomous (Brief, pp. 86-93, 106-108).

Both arguments are without substance. The Commission did not apply improper criteria but on the contrary used criteria that the Commission has applied over the years in analogous cases. The evidence to which the Division points to support its second ground of argument relates essentially to matters that are not in issue. Certainly the Commission recognized that after the merger ITT would own all of the stock of ABC with all of the rights and obligations that ownership implies. Its findings do not depend upon any assumption that as a parent company ITT will not exercise some measure of control over some aspects of the activities of ABC, particularly those that relate wholly to financial matters. The Commission's findings were directed to the more specific and the only relevant question which was whether the autonomy provided for by the internal ITT-ABC arrangements and the representations of the applicants, considered in the light of the Commission's continuing regulatory authority, provided reasonable assurance that ABC's broadcasting activities in the field of news and public affairs will be conducted honestly and independently.

Contrary to the Division's contention the Commission's "reliance upon representations or promised internal arrangements" is not "inconsistent with the legal criteria that have customarily, and properly, been applied to the problem of broadcaster autonomy" (Brief, p. 84). Every time the Commission grants a license it does so in reliance



upon representations made by the applicant. Indeed, its regulatory function is founded upon its ability to insure fulfillment of these representations by measuring promise against performance in renewal proceedings at periodic intervals. Not only does the Commission generally rely upon an applicant's representations as a basis for a public interest determination but it has time and time again relied upon such representations when considering issues precisely analogous to those raised in this proceeding.

In cases in which a local newspaper applies for a broadcasting license the Commission has regularly accepted and acted upon the applicant's representations that its broadcasting facilities would be operated autonomously. *Mason City Broadcast Company*, 3 F.C.C. 116, 123 (1936) (advertising, political, educational and commercial policies will be independent; station will be operated "as an entirely separate department"); *Pacific Radio Corporation*, 5 F.C.C. 427, 429 (1938) (station and newspaper to "be kept entirely separate as to location, personnel, business practice, and editorial expression"); *Stephen R. Rintoul*, 11 F.C.C. 108 (1945) (station and paper to be operated separately; separate employees, news service, and reporters; no joint rates; sales departments will compete); *Belleville News-Democrat*, 4 RR 1043 (1950) (station and paper will have separate staffs and no joint rates); *Tribune Co.*, 9 RR 719 (1954) (newspaper and radio and television stations will operate separately; no joint rates), *aff'd sub nom., Pinellas Broadcasting Co. v. FCC*, 97 U.S. App. D.C. 236, 240-241, 230 F.2d 204, 208-209, *cert. denied*, 350 U.S. 1007 (1956); and see *Elyria-Lorain Broadcasting Company*, 5 F.C.C. 2d 231 (1966); *WGRY, Inc.*, 2 RR 2d 718, 722 (1964) ("separate staffing is assured" and "policy is aimed at full editorial autonomy").

In the face of this long and consistent line of precedents the Division's argument that the Commission here applied improper legal criteria must be rejected.<sup>26</sup>

The Commission is not alone among regulatory agencies in relying upon assurances with respect to corporate autonomy and other aspects of intercorporate relations. The Interstate Commerce Commission has relied upon such assurances in approving merger applications under Section 5 of the Interstate Commerce Act. See *Missouri Pac. R. R.—Control—Chicago & E.I. R. R. Co.*, 327 I.C.C. 279, 286-288 (1965), *aff'd sub nom. Illinois Central Ry. v. United States*, 263 F. Supp. 421 (N.D. Ill. 1966), *aff'd*, 385 U.S. 457 (1967); *Toledo, P. & Wn. R. R. Co.—Control*, 295 I.C.C. 523 (1957), *appeal dismissed*, 165 F. Supp. 893 (D. Minn. 1958), *aff'd*, 361 U.S. 173, 182-183 (1959). See also *Chesapeake & O. Ry.—Control—Baltimore & O. R.R.*, 317 I.C.C. 261, 275, 336 (1962), *aff'd sub nom. Brotherhood of Maintenance of Way Employees v. United States*, 221 F. Supp. 19 (E.D. Mich.), *aff'd*, 375 U.S. 216 (1963).

The Division also argues that the evidence demonstrates that in fact ABC will not operate autonomously and that

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<sup>26</sup> The authorities cited by the Division do not support its argument that there is a rule of law that the Commission may not give appropriate weight to assurances relating to corporate autonomy and related matters. *Citizens TV Protest Committee v. FCC*, 121 U.S. App. D.C. 50, 348 F.2d 56 (1965) involved the Commission's declared policy against duopoly. There had been no evidentiary hearings and the Commission had stated no facts that would have justified departure from its announced policy. The court's reference to the latter point recognizes that even in the case of an announced administrative policy the Commission may in appropriate circumstances act in reliance upon representations. The case does not hold that the Commission has any general policy or that there is any rule of law that precludes the Commission from giving weight to representations in appropriate circumstances. In fact the Commission has done so even in cases involving its announced duopoly policy. See, for example, *KGKO Broadcasting Co.*, 11 F.C.C. 929 (1945); *Booth Radio Stations, Inc.*, 13 F.C.C. 717 (1949); *Rochester Broadcasting Co.*, 22 F.C.C. 1059 (1957).

The language of the Commission in the *Report on Chain Broadcasting*, Docket No. 5060 (1941), was directed to the particular situation with which the Commission was there dealing and did not lay down any general rule of law or policy.

accordingly there is no assurance that the integrity and independence of its news and public affairs activities will be preserved. Here, as in other branches of its argument, the Division is quarreling with the inferences and conclusions that the Commission drew from the record as a whole.

To sustain its position on the facts the Division points to evidence that it asserts shows that ITT controls and coordinates the activities of its other subsidiaries; that these subsidiaries are aware of the importance of conforming their activities to the interests of ITT as a whole; and that certain ITT officials will be on the Board of ABC (Brief, pp. 87-91). This evidence does not demonstrate that the Commission erred. The Division simply assumes that it can demonstrate that ABC will not retain the autonomy necessary to enable it to conduct news and public affairs activities independently and honestly by pointing to this and other evidence that does not touch program content but relates rather to such things as procedures for settling inter-subsidiary disputes, controls over accounting and financial practices, supervision of technical developments, and the normal general interest of company officials in the operations of subsidiaries. The length to which the Division pushes this assumption is apparent in the sinister significance it finds in the fact that the President of ITT has shown a "personal concern with the business operations of ABC" (Brief, p. 90).

Indeed, the Division's entire argument appears to rest upon a basic assumption that it is simply impossible for a broadcasting organization which is part of a larger corporate family to maintain any autonomy and independence with respect to the content of its programs. As noted above, that assumption is clearly contrary to the Commission's experience with numerous other diversified licensees (R. 5325, ¶ 78). Moreover, here the Commission had before it evidence of past conduct, not predictions as to the future, which entitled it to reject this assumption. ABC News has in the past operated as an entirely separate and autonomous division within ABC. It has its own president and a complete departmental structure of its own. Its president

has been responsible for the overall operation of the division, including the selection of news, special events and public affairs programs. He reports directly to the Executive Vice President of ABC but neither the Executive Vice President nor the President of ABC exercises any authority over the content of news or public affairs programs (Application, Ex. I-3, Attachment E, pp. 1-6, R. 5764-66; Tr. 236-37, 248-49, 283-84, 1652, 1655, 1659-61, 3271-74, 3299-3301).

The record fully supports the conclusion that the ABC News division has maintained its independence and autonomy and that the top management of ABC has not interfered with the content of the programs, much less colored or distorted the news, either to advance other corporate commercial interests or for any other purpose.<sup>27</sup>

The applicants have represented without qualification to the Commission that ABC's existing policies and management, including the policies and management of ABC News will be continued (Application, Exhibit I-3, Attachment E, pp. 1-6, R. 5764-66). There is no substantial evidence in the record that will support any argument that these assurances are unworthy of belief or incapable of accomplishment.

In accepting these representations the Commission did not have to rely solely upon the integrity of the applicants. There was evidence of conditions, not dependent upon the applicants' assurances, that will operate upon the self in-

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<sup>27</sup> The Division attempts to make something of what it describes as the "overall budgetary control of the ABC board" (Brief, p. 107). The fragile nature of this argument is indicated by the fact that in the entire history of ABC the board has passed upon the budget for only one program—a four hour special presentation (Tr. 2574-78, 3283-84). The Division also attempts to make something of the fact that officials of ABC News consult other ABC officials in deciding whether to preempt regularly scheduled programs for documentaries (Brief, p. 107). There is no evidence that this coordination ever affected the content of documentary programming. Moreover, the ABC News department has absolute discretion to interrupt programming for major news events (Ex. I-3, Att. E, pp. 5-6, R. 5765-66). The Division concedes that "there is no evidence that ABC's management has involved itself in the day-to-day running of regular news programs" (Brief, p. 107).

terest of the applicants and insure that the representations will be fulfilled (Tr. 285, 286, 3301-02, 4137). The Commission noted these conditions, as we have pointed out at pp. 43-4 above, in its findings and it also noted its own intention to exercise its regulatory powers to make sure that the applicants did not depart from their assurances.<sup>28</sup> We submit that the Commission did not rely excessively or unreasonably upon the assurances of the applicants and that its determination was supported by substantial evidence. That determination represents the informed judgment of a regulatory agency on future business conduct. "This is where the rule, that a conclusion within the realm of rational deduction or inference stands despite differences of opinion, has its greatest application." *American Airlines*

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<sup>28</sup> The Division argues that the Commission does not have either the authority or the capacity to enforce the applicants' assurances (Brief, pp. 108-109). It is wrong on both points. The Commission's authority to deny applications for renewal of licenses (§ 307(d)), and to revoke licenses (§ 312(b)) gives it power to take remedial action in the event that the applicants disregard their assurances by distorting or coloring the news. In the administration of its licensing powers the Commission has considered whether licensees were objective in their handling of the news. *Providence Journal Co.*, 12 F.C.C. 267 (1947); *WB.NX Broadcasting Co., Inc.*, 12 F.C.C. 805, 837 (1948); *G. A. Richards*, 14 F.C.C. 429 (1950); *Lamar Life Broadcasting Co.*, 38 F.C.C. 1143 (1965), *reversed and remanded sub nom. Office of Communication of United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994 (1966); *Tampa Times Co.*, 10 RR 77 (1954); *Toledo Blade Co.*, 25 F.C.C. 251 (1958). The Commission has broad investigatory powers under Section 403 of the Act. It has established an Office of Network Study (47 C.F.R. 0.80) whose function is the continuing review of network operations as they may affect the public interest and which has in the past held hearings concerning the networks' news and public affairs programming (FCC Docket No. 12782). In view of these facts, and considering the other sources of information available to the Commission, the suggestions that the Commission will not be able to determine whether the applicants are complying with their assurances and that it will have no sanctions to enforce those assurances are not persuasive. And it may be assumed that the Division is not suggesting that the Commission does not intend to enforce the assurances.

v. *CAB*, 89 U.S. App. D.C. 365, 368, 192 F.2d 417, 420 (1951).<sup>29</sup>

**3. *The Commission Gave Full Consideration to and Correctly Appraised the Evidence Relating to the Alleged Efforts of ITT Officials to Influence Reporters***

The Division attacks the Commission for alleged "erroneous disregard of the evidence of ITT efforts to influence coverage of this proceeding" (Brief, p. 109). It is untrue to suggest, as the Division does, that the Commission "disregarded" or "summarily" dismissed the Division's evidence about conversations between reporters and ITT officials.<sup>30</sup> The fact is that the Commission gave the Division's somewhat overheated charges about these incidents more serious consideration than they deserved. The Commission devoted four paragraphs of its second report to a detailed review of the evidence alleged to support those charges (R. 5323-24, ¶¶ 74-77). The Commission's discussion of the facts was accurate and complete (the Division does not really contend otherwise), its appraisal of the evidence was

<sup>29</sup> The American Civil Liberties Union (ACLU) in its brief amicus curiae misconceives the nature of the Commission's determinations with respect to the fitness of ITT. The Commission's findings do not assume, as the ACLU suggests, that ITT was unfit to be a licensee nor did the Commission require ITT to abdicate its management responsibilities as a prospective licensee. ITT informed the Commission that it proposed, in essence, to continue ABC's existing policies and management, and further assured the Commission that the programming of the network and the stations would not be utilized to advance ITT's commercial or other interests. This is no more a "delegation" of program responsibility than is ABC's present relationship with the ABC News department. Surely the ACLU would not argue that ABC has abdicated responsibility or that it has placed an inappropriate burden of enforcement upon the Commission. Full and complete responsibility for the proper conduct of the licensed operations remains with ITT and it must answer for any departure that prejudices the public interest or convenience.

<sup>30</sup> Although three reporters testified, the Division in its brief relies upon the testimony of only one of them—a reporter for the New York Times. It may be noted that testimony from all three reporters indicates that interested persons often talk to reporters about supposed inaccuracies or omissions in their stories and that this is considered entirely proper (Tr. 2976-77, 2990-1, 2993-94, 3000-03, 3012).

dispassionate, and the inferences and conclusions that it drew from the evidence were reasonable. We are, therefore, content to rest upon the Commission's statement without burdening the Court with a discussion of the details of the Division's insistence that this Court should re-assess the evidence and substitute its own inferences and conclusions for those of the Commission.

**4. *The Commission Acted within the Area of Its Administrative Responsibility in Declining to Regard ITT's Foreign Business Activities as a Per Se Bar to Entry into Broadcasting***

To support its argument that ITT will subvert the integrity of the ABC News division, the Division relies heavily upon the foreign business interests of ITT, asserting that the Commission ignored the "pressures" that these interests will exert (Brief, pp. 101-106). The Division points out that ITT has substantial interests abroad and that because of those interests it necessarily has relations with officials of foreign governments. Based on these facts, which were all before the Commission and are not disputed, the Division contends that ITT is not "just another company" (Brief, p. 101); that its "ownership of a major news medium would give rise to serious conflicts of interest not comparable to other licensees" (Brief, p. 104); and that "ITT [is] not the same as other licensees" (Brief, p. 106).

The Division begins its argument on this point by attempting to suggest that there is some formal deficiency in the Commission's opinion because it made no "specific findings" about the foreign interests of ITT (Brief, p. 101). The Commission's findings expose the transparency of this attempt to disguise in language appropriate to judicial review an argument that is essentially directed to an issue of policy. In its first report the Commission found:

"The record is quite clear and complete on the point that ITT has extensive foreign investments. The Commission is well aware of this, and has consider-



able detailed information regarding these beyond that which appears in this docket, since ITT, as an American corporation engaged in international record communication (like RCA), has been a licensee of the Commission since the Commission was established" (R-87, ¶ 36)

In the face of these findings any suggestion that the Commission was not fully informed about ITT's foreign activities or that it disregarded the relevant facts cannot be taken seriously.<sup>31</sup>

The real thrust of the Division's argument is not, therefore, directed to the Commission's consideration of the evidence or to the sufficiency of its findings. Instead the argument is that ITT must be barred from broadcasting simply because it has extensive business interests in foreign countries and relations with foreign governments. The Division's charge that those interests would inevitably lead ITT to tamper with the news, if valid, is so serious that it would

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<sup>31</sup> Mr. Gencen testified at length about the foreign business operations of ITT; he described, among other things, the nature of its interests in foreign subsidiaries, the nature of their activities and the revenue derived from those activities (Tr. 484-500, 592-93, 600).

Attachment A to Commissioner Bartley's dissent from the Commission's first opinion (R-87) consists of a list of the major subsidiaries of ITT including those operating in foreign countries. The Division's own brief contains numerous record references to other evidence relating to the foreign activities of ITT (Brief, p. 102).

The Division complains that the Examiner excluded one of its exhibits (J261, R. 3276) which it asserts shows the nature of the relationships between ITT and foreign governments and their officials (Brief, pp. 102-103). The exhibit related to activities in 1954 and 1955 (Brief, p. 103, note 94). The Examiner excluded the evidence on the ground that it related to occurrences too remote in time from the present proceeding (Tr. 2810) and the Commission affirmed this ruling. We submit that the exclusion was correct because the evidence had no probative value as to the character, integrity or activities of the present management of ITT. In any event the exclusion was not prejudicial. The Division now asserts that the evidence was not offered to show misconduct but only to show the "character of the foreign involvements" of ITT. There was ample other evidence of record disclosing ITT's foreign business interests and activities.

stand as an absolute bar to a Commission finding that either the transfer or the issuance of a broadcasting license to ITT would "serve the public interest." The Division cannot mitigate the full force of its position by arguing the Commission was merely "*obliged to consider* that \* \* \* the merger would increase the pressure upon vigorous, unfettered discussion of news" (emphasis added) (Brief, p. 106). The Commission did consider the foreign business interests of ITT as they related to the integrity of news operations and rejected the Division's arguments. What the Division is in fact contending for is a broad rule of administrative policy or judgment that any company with foreign business interests as extensive as those of ITT is disqualified from engaging in broadcasting.

In refusing to adopt the asserted rule of policy or judgment the Commission acted well within the area that Congress has committed to its authority. The wisdom of the Commission's decision is not here in issue. The only question presented is whether the Commission stated reasons and made findings that provide a rational basis for its determination. We submit that in this respect the Commission fully discharged its responsibilities and that its reasons and findings show that it had a reasonable basis for rejecting the argument that ITT should be disqualified as a licensee because its foreign business interests threatened the integrity of the news.

In the first place, the Commission found that the rule of policy for which the Division contended has no rational basis in the Commission's past experience. The Commission found "from [its] experience in the regulation of communications that many of our large broadcasting licensees and the two other television networks . . . have substantial foreign interests, including subsidiary corporations in many countries" and yet it has seen "no evidence at any time that any of these foreign interests have influenced any of

the programing presented in this county" (R-87, ¶ 36).<sup>32</sup> The major premise of the Division's argument, that foreign business interests inevitably led to news control, was therefore contradicted by the facts of actual experience.<sup>33</sup>

In the second place, the Commission observed that it did not appear appropriate to establish the strict but vague rule against "foreign interests" for which the Division contended. The Division did not suggest any standard by which to measure the quantum of foreign business interests which would serve as an absolute bar to broadcast ownership. Yet without such a standard the application of the rule to companies with foreign interests would create grave administrative difficulties for the Commission. As the Commission itself noted the rule "would surely disqualify a number of major broadcast licensees" (R-87, ¶ 36).

Finally, the Commission pointed out that it could not fairly and rationally draw a distinction between ITT and other licensees or prospective licensees with outside interests. It stated (R-87, ¶ 39):

" \* \* \* since the beginning of broadcast licensing the Commission has licensed manufacturers of radio

<sup>32</sup> The Division attempts to denigrate the Commission's reference to other licensees on the ground that "unlike most American companies doing business abroad, ITT is, in origin, a foreign operating company and its predominant source of profit overseas is in the sale of telecommunications equipment" (Brief, p. 102). The reference to the origin of ITT is irrelevant in view of the fact that all of its officers and directors are American citizens and less than eight percent of its stock is alien-owned (R-87, ¶ 36). The reference to the predominant source of its overseas profits disregards the fact that, as the Division admits, after the merger ABC will be "the largest source of revenue and profit for ITT" (Brief, p. 90). The record shows there is "no grouping of sales in any country outside the United States [that] \* \* \* would be at all close to what would be represented by ABC's revenues \* \* \*." (ITT Ex. 12a, p. 5, R-32).

<sup>33</sup> In an analogous situation arising under Section 310(a) of the Communications Act this Court held that the Commission may properly rely upon evidence as to past experience in rejecting a claim of disqualification for foreign affiliations. *Noe v. Federal Communications Commission*, 104 U.S. App. D.C. 221, 223-24, 260 F.2d 739, 741-42 (1958), *cert. denied*, 359 U.S. 924 (1959).

receiving equipment, other manufacturers and industrial enterprises, church groups, labor groups, newspaper publishers, and other enterprises engaged in a vast variety of business activities. Proposals to exclude particular business interests, which have been made from time to time, have met with little sympathy or success in Congress, and have not been adopted by the Commission. It is too late in the day to argue that such outside business interests are disqualifying. In any event, we must apply the same principles to all licensees. *Melody Music Inc. v. F.C.C.* 345 F2d 730 (CA DC, 1965); *Mary Carter Paint Co. v. F.T.C.* 333 F2d 654 (CA 5th 1964)."

The Division cannot attack the Commission's reasoning by asserting that it would be fair and reasonable to draw a distinction between all other present or potential broadcasters on the one hand and ITT on the other simply because it has foreign business interests and relations with foreign governments. Such a distinction could not be justified either in terms of motive for controlling the news or in terms of the impact upon the American public that might result from that control. Unless the Division believes that xenophobia is a rational basis for regulatory policy it cannot take the position that there is something peculiarly invidious about an American company's relations with a foreign government that distinguishes them from its relations with state and federal governmental agencies in the United States. And the Division surely would not contend that there is any greater public interest in the integrity of news reporting of foreign events than there is in news reporting on domestic policies and public officials. Thus, unless the Division's arguments are to rest upon a wholly arbitrary and unreasonable ground of classification they require the conclusion that a wholly domestic company which had substantial business with the federal government could not be trusted as a licensee because it could be expected to color or to suppress adverse news concerning

governmental policies. Similarly, the contention that the pressure of outside interests would inevitably lead broadcasters to manage the news would require the conclusion that all religious groups, labor unions, and political figures should be barred as licensees.

The Division's own arguments recognize that ITT's foreign interests are not a reasonable ground for barring it from the American broadcasting industry. In its argument concerning the status of ITT as a potential entrant into networking, either as a standard broadcast operator or through CATV, the Division asserts that ITT has "unusually strong \* \* \* capabilities \* \* \* to make a substantial competitive contribution" to broadcasting (Brief, p. 50). This assertion belies the Division's charge that ITT cannot be trusted to operate a news department of integrity.<sup>34</sup> It suggests that the Division's professed concern over the possibility of biased news reporting is simply a cover for a policy position that is actually designed to impose upon the Commission the Division's notions about the proper structure of the national television market.

**B. The Commission Did Not Err in Rejecting the Argument That the Merger Would Substantially Injure the Public Interest by Eliminating the Independence of ABC in Regulatory Matters**

In response to the Division's argument that the applications should be disapproved because the merger would eliminate ABC as an independent actor in regulatory proceedings the Commission found that any such adverse impact on the public interest would be "slight in nature" (R. 5310, ¶ 45; R. 5329, ¶ 84(6)). The Commission found

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<sup>34</sup> The nature of the Division's argument is such that it cannot be confined simply to the present case. The Division can hardly contend that it would be consistent with the public interest for the Commission to permit ITT to subvert the news integrity of another network system or of any group of broadcasting stations, or for that matter of a single station.

that in regulatory matters there was only "a small area of conflicting interest between ABC and ITT" (R. 5310, ¶ 45).<sup>35</sup> The Commission also gave appropriate weight to the explicit assurances of ITT, contained in a formal policy statement and included in the record, that after the merger ABC would be free to protest before the Commission any rates or charges proposed by ITT and to present ABC's own views to the Commission or to any other governmental agency on questions relating to satellite or other forms of communication (R. 5329, ¶ 84(6)).<sup>36</sup>

It might be thought that if there is any question on which the view of an agency is entitled to some degree of deference it is a question relating to the integrity of its own regulatory processes. The Division, however, argues that the Commission's judgment was uninformed and unwise and should be discarded in favor of the Division's notions of judicious regulatory policy.

The Division's arguments are cast entirely in predictive and hypothetical terms. It concedes that the alleged "loss of ABC's independent voice" is not a "certainty" but asserts that the "potential" of such loss is a detriment to the public interest. It points to no specific instance in the past in which the absence of ABC from an administrative proceeding would have left unrepresented some significant

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<sup>35</sup> In both its first and second reports the Commission noted the possibility of conflict between the broadcasting interests of ABC and the common carrier interests of ITT. It pointed out, however, that this potential conflict could relate only to international operations since ITT is not a domestic common carrier and that by far the greater part of a network's common carrier usage is domestic and not international (R-87, ¶ 37; R. 5310, ¶ 45).

<sup>36</sup> So far as concerns the Division's attack upon the timing of the policy statement, no one questions that the statement was prepared to implement the representations of ITT at the September hearing. Viewed in that light, it affords additional evidence of the resolve of ITT to comply with its representations. The basic significance of the statement lies in the fact that it contains assurances given by ITT on the record to a regulatory agency which through its control over licenses is in a position to take corrective action if the assurances are not fulfilled.

point of view.<sup>37</sup> Its arguments simply assume, without any demonstration, that if in the future ABC should fail to participate in some regulatory proceeding an important view on private or public interest would not be presented to the Commission or other governmental agency involved. This assumption is in the literal sense incredible in view of the large number of companies involved in broadcasting, in CATV, in the development of communication technology, and in the manufacture and sale of communication devices and equipment; the even larger number of companies who are substantial users of communication services of various kinds; the vitality and resources of the government agencies interested in communication problems; and the charitable and educational institutions that have recently taken active positions with respect to various issues in the field of communication.

If the future is to be judged by the past, a plethora of parties and points of view, not their scarcity, is likely to be one of the principal problems that the Commission will face in the discharge of its regulatory responsibilities. Certainly the Commission was not required to disapprove the present application because of the possibility that at some time in the future in some administrative proceeding there might be one less litigant.

### **III. There Was No Lack of Candor on the Part of the Applicants' Principal Officers**

The Division's "constraint" in raising an issue as to the lack of candor of the applicants' principal officers is understandable (Brief, p. 113). What is less understandable is

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<sup>37</sup> The Division is not fortunate in its choice of the two instances referred to on page 94 of its brief. In the debate on domestic satellite policy ABC was not the only party advocating a special purpose system of synchronous satellites for broadcast purposes; there were eight other parties who took essentially the same position on the question of law and policy involved (FCC Docket No. 16495). And in the instance involving the right of broadcasters and other users to deal directly with Comsat there were approximately 15 other parties who took nearly the same position as ABC (FCC Docket No. 16058).



why it concluded that the argument deserved the attention of this Court, particularly since its sole grievance is that the Commission failed "to give due consideration" to its contentions (Brief, p. 121). While the Commission disagreed with, and rejected, the contentions advanced by the Division, it clearly gave thorough consideration to the argument that the applicants were lacking in candor and completeness. It found:

"The Department charges applicants with 'lack of candor and completeness' in testimony on the basis of some few inconsistencies in the details of testimony and evidence and their characterization of some of the testimony.<sup>8</sup> There is no doubt that in the course of this very protracted, complex and difficult investigation and proceeding some errors have been made in the presentation of evidence and some changes in positions and emphasis have been made by all of the parties. However, errors and inconsistencies of this nature are not unusual in cases of this magnitude and complexity. It would be quite unwarranted to draw any inferences as to candor or character from such relatively minor aspects of the testimony and proceedings. These charges of the Department are more a reflection of the strongly adversary and partisan spirit which prevailed between the parties than a reflection of a fair appraisal of the record. It is noteworthy that the parties were highly adversary throughout the course of their participation in the supplementary proceeding, and this has given us some assurance that all aspects of the matter have been thoroughly explored and that all possibilities of evidence and inference adverse to the proposed merger have been thoroughly investigated. The Department began its investigation by the issuance of Civil Investigative Demands to both ABC and ITT on December 9, 1965. We have examined those demands and have found them comprehensive, wide

ranging and thorough. Subsequently the Department also issued a series of further demands for documents; and the record shows that there has been substantial compliance with all demands. We are confident that the Department, with its extensive and highly skilled investigatory resources and its experienced and expert ability at economic analysis has put into the record every fact of possible relevance to our consideration and decision of this matter" (R. 5327, ¶ 82) (footnote omitted).

This finding, which is a complete answer to the Division's contention, is fully supported by the record.

The Commission made a reasoned decision with respect to the asserted discrepancies in the evidence. The determination of questions relating to credibility, candor and evasiveness has historically been the responsibility of the trier of fact. This Court has regularly sustained the judgment of the Commission on such matters so long as its judgment was reasonable and supported by substantial evidence, *e.g.*, *McKenney v. FCC*, 116 U.S. App. D.C. 412, 324 F.2d 444 (1963); *Kidd v. FCC*, 112 U.S. App. D.C. 288, 302 F.2d 873 (1962); *City Cabs v. FCC*, 107 U.S. App. D.C. 136, 275 F.2d 165 (1960); *Scripps-Howard Radio, Inc. v. FCC*, 89 U.S. App. D.C. 13, 189 F.2d 677, *cert. denied*, 342 U.S. 830 (1951). Indeed in the very case cited by the Division, *Hall v. FCC*, 99 U.S. App. D.C. 86, 237 F.2d 567 (1956), the court held that the significance to be attached to a misrepresentation was a question for the Commission itself.

Most of the incidents detailed in support of the Division's contention reflect ambiguities and inconsistencies that are commonplace in any extended trial. Few of them disclose any real error and none even suggests a calculated or deliberate misrepresentation.

The Commission addressed itself in detail to an incident heavily relied upon by the Division both before the Commission and here—Mr. Goldenson's description of the loan

limitations imposed upon ABC by Metropolitan Life.<sup>38</sup> His recollection of the precise terms of the agreement was not accurate. It appears that he was describing not the terms of the loan agreement, but the practical limits on ABC's borrowing power under the agreement as he understood them on the basis of a report of a telephone conversation with a vice president of Metropolitan (AR 41, Attachment 5, p. 2, R. 845). The existence of such practical limits was confirmed by the Metropolitan official (*Ibid.*; Tr. 1332). Moreover, because Mr. Goldenson overstated rather than understated ABC's borrowing power his attorneys advised him, upon discovery of the error, that it was unnecessary to make a formal correction of the record (Tr. 1332, 1584-86, 2453-59). Surely Mr. Goldenson's error was one of imprecision or inattention and was not a calculated representation, particularly since ABC itself had, in compliance with Commission requirements, previously filed the loan agreement with the Commission.

The other isolated allegations of lack of candor similarly show no intent to misrepresent or disregard for the truth.

a. The Division alleges that Mr. Geneen was not candid in his testimony dealing with ITT's interest in,

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<sup>38</sup> The Commission stated:

"For example, the Department argues that Mr. Goldenson incorrectly represented to the Commission that the ABC loan agreement with Metropolitan Life restricted ABC borrowing to 50% of its assets. In fact, the written loan agreement did not contain such a restriction, although it did contain a restriction against further borrowings, with some limited exceptions, without the express permission of Metropolitan Life. The Vice President of Metropolitan Life who was in charge of this loan arrangement wrote to the Department and subsequently testified in the supplementary hearing concerning this matter. It is evident from his letter and the testimony that 40% of net tangible assets is the normal limit for corporate borrowers, and that this limit was exceeded with ABC only because it is a 'specialized borrower', that ABC was approaching 50% of net tangible assets, and that ABC was aware of these facts. In the circumstances, we believe that Mr. Goldenson could have reasonably believed the correctness of the statement he made and that he cannot properly be found to have set out deliberately to deceive the Commission" (R. 5327, ¶ 82, n. 8).

and efforts to enter, the broadcasting and CATV industries.<sup>39</sup> The complaint goes to emphasis and relative importance. There is no basis for suggesting that this testimony did not honestly describe Mr. Geneen's evaluation of ITT's interest and efforts viewed in the context of the total business activities of ITT and the relative unimportance of the interests he was describing.

b. At the original hearing, Mr. Geneen described the ITT management system as including "substantially autonomous company and division managements," (Tr. 165) and stated:

"The proposed method of operation of ABC as a substantially autonomous subsidiary, with the present ABC management and its distinguished board of directors, is harmonious with the present ITT management system and can be carried out in the manner contemplated in the application in full accord with ITT's responsibilities to the public and to the FCC" (Tr. 167).

He also stated that with regard to ABC's autonomy, "in a meaningful area, it won't be a lot different in certain respects as to details" than the other entities in the ITT organization (Tr. 503). Mr. Geneen went on to describe in considerable detail the way in which the ITT management system operates, i.e., substan-

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<sup>39</sup> At the September 1966 hearing, he testified, in response to a question as to whether ITT had given attention to the possibility of buying other stations: "We did hold some conversations from time to time in a general way, with people who purported to think we should get into stations, and that sort of thing, but we never got anywhere with that" (Tr. 592).

At the same hearing he testified in passing that in the ITT Annual Report "I think it was said that we have some very small CATV experimental operations *which I can talk about if you want to* (italics supplied) but we have no broadcasting of that type" (Tr. 516). Thus, it is clear that he was not hiding any facts nor did he lack candor. He did not elaborate on the subject because he was not asked to do so by any of the seven Commissioners. ITT counsel prior to Mr. Geneen's testimony had already made reference to the fact that ITT "has lent money to six separate CATV entrepreneurs. It has lent approximately \$7 million" (Tr. 121-2).

tially autonomous subsidiary operation accompanied by financing and reporting control and headquarters staff support (Tr. 165-67, 503-06, 552-55).

The Division claims that he should have defined with greater particularity and detail the difference in the relationship which would exist between ITT and ABC in the future and that which now exists between ITT and its subsidiaries. There was no lack of candor or even in consistency in his testimony; the fact is that Mr. Geneen, at the original hearing, made clear the significant differences in corporate and management structure proposed for ABC so as to assure its continued autonomy (Tr. 502-6; 530-31).

c. At the original hearing Mr. Geneen testified that ITT had made a commitment to ABC of \$50 million to which the ITT Board had "already committed itself in principle" (see Tr. 558-571). On October 12, 1966, the ITT Board met and reviewed the proposed merger, including the testimony in September, 1966, concerning the \$50 million commitment. At the April, 1967 hearing, Mr. Geneen described the October 12 meeting as "an endorsement in principle" of the commitment and stated that the fact of this commitment was reflected in the minutes of the meeting (Tr. 2021). ITT's counsel was of the opinion that this particular action constituted approval by the Board and represented a legally binding commitment on behalf of the Board (Tr. 2023). The Division's claim of lack of candor merely raises a question as to whether the Board proceeded with appropriate formality. There is no evidence whatsoever that any member of the Board questioned the commitment or that any reservations or qualifications were attached to it. And the Division makes no claim, even now, that ITT is not, in fact, committed to advance the money to ABC.

d. On July 25, 1966, and in the September hearing, Mr. Goldenson described ABC's capital requirements for plant and equipment "already known and planned by ABC" as \$34 million for color conversion, \$17 mil-

lion for the purchase and furnishing of ABC's new office headquarters in New York City, and \$90 million for constructing and equipping new studio complexes to be built in New York and Los Angeles (Tr. 97).

The Division challenges this statement as a misrepresentation or exaggeration because ABC did not have firm plans to make this total expenditure. The record, however, reflects that ABC had long recognized the need for these extensive improvements and although a specific plan which had been submitted by the Austin Company had been rejected, nevertheless ABC continued to recognize that substantial funds would have to be expended; the rejection of the plan was merely a rejection of a particular method of meeting that need.<sup>40</sup>

e. Mr. Goldenson testified concerning the difference in ABC's coverage of the country through primary affiliates and the comparable coverage of its competitors and indicated that the 5% disadvantage at which ABC operates "means in daytime and nighttime probably \$72 to \$73 million of revenue for the year '66 alone" (Tr. 1476). The Division claims that he should have explained that the lack of popularity of ABC programs affected his revenue estimates. But his statement did not purport to contain a full explanation of all the assumptions underlying the \$72-73 million estimate; they were furnished in an exhibit subsequently introduced in evidence (AR63, R. 1271).

Mr. Goldenson also testified that the problem with secondary affiliates is that they might present ABC programming at 12:00 midnight or 1:00 a.m. or Saturday afternoon or Sunday afternoon when there are

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<sup>40</sup> The Austin plan had been rejected because it did not utilize space in the most efficient manner. However, the cost estimates for the New York construction (approximately \$40 million) which were given to the Commission during the hearings were based upon a cost per foot estimated for the Austin plan, which cost figures would not be affected by the reasons for rejecting the plan (see AR19, 20, 39 Parts II, III, R. 288-91, 558-679; and ABC-ITT Proposed Findings, ¶¶ 4.12-4.30, R. 4572-79).

only 15-20% sets in use as compared with 65-70% during the period 7:30 p.m. to 11:00 p.m. (Tr. 1619). The Division claims that this was erroneous with respect to clearances at late hours since ABC had no clearances at such hours, relying upon an Exhibit (AR65, R. 1284) which dealt with only one particular week. Even this exhibit demonstrates that numerous prime time programs were cleared at time periods during which, according to the November, 1966 ARB Reports, the sets in use were less than 20% of this total (ABC-ITT Reply Findings ¶¶ 2.35, 2.36, R. 5199-200). Thus, the exhibit supports the main point Mr. Goldenson made in his testimony: ABC obtained clearances during times when the audience was far less than during prime time.

f. At the April, 1967 hearing, Mr. Goldenson stated that without a large amount of money, ABC would "probably stop our forward progress of our East Coast and West Coast facilities" (Tr. 1665); would have to cut back in ABC personnel, cut salaries and give consideration to cutting dividends (Tr. 1667). The Division argues that such serious consequences were not mentioned in the September, 1966 hearing and claims a lack of candor on the part of Mr. Goldenson. The Division has not read the September record. Mr. Goldenson's testimony at the two hearings with respect to ABC's pressing need for substantial funds and the consequences of not obtaining such funds is entirely consistent (Tr. 99-100, 224-58, 331-32). Indeed, he specifically referred at the September hearing to the effect of the merger on ABC's plans for, among other things, its proposed East Coast and West Coast production facilities (Tr. 213), its news and public service programming (Tr. 331) and its colorization expenditures (Tr. 573).

Finally, it should be noted, as the Commission found, that there is no claim that any significant fact or circumstance bearing on the proposed merger has been withheld or was not available for the Commission's appraisal. Thus there



is no question of an incomplete record. Asserted lack of candor is relevant only if it is of such a nature as to persuade the Commission that a party "may be unworthy of the reliance which the Commission necessarily places on licensees" (*Hall v. FCC, supra*, at 60, at 577). The Commission brought to this question not only its general experience over the years in complex adversary proceedings but also a regulatory knowledge of both ABC and ITT that long predates their merger proposal. ITT has been a common carrier licensee ever since the Commission has been established. ABC has been an important licensee for many years and in addition has been a major factor in network operations. Thus the Commission's conclusion as to the trustworthiness of both applicants has a solid foundation not only in the evidence in this case but also in the Commission's own experience.

#### **IV. The Commission's Determination that the Financial and Technological Strengthening of ABC Would Constitute a Substantial Benefit to the Public Interest Has a Rational Basis in Findings that are Supported by Substantial Evidence**

The Commission's determination that the availability of ITT's financial resources to ABC would constitute a substantial benefit to the public is attacked by the Division on two grounds. It claims there were neither essential findings nor supporting evidence as to (1) ABC's need for such resources or (2) the inability of ABC to obtain the necessary financial assistance from sources other than ITT.

The Division does not appear to challenge on evidentiary grounds the Commission's determination that the availability of ITT's technological resources to ABC would constitute a substantial benefit to the public. It does attack the Commission's conclusion that increased utilization of UHF broadcasting will result from the merger, and in particular claims that the Commission committed legal error in imposing and relying upon conditions designed to better assure continued efforts by the merged company in the field of UHF broadcasting.

**A. There Was Ample Evidence in Support of the Commission's Finding that a Lack of Funds Has Adversely Affected ABC's Competitive Position and that Availability of the Financial Resources of ITT Would Result in a Substantial Benefit to the Public Interest**

*ABC's competitive position.* The Commission, with its expert knowledge of the television industry, its long familiarity with ABC's position in the industry, and its special awareness of the unique and heavy public service demands placed upon television networks, found that with financial strengthening ABC would be able to compete more effectively with its two larger, more profitable network rivals and would thus be better able to serve the public (R. 5316-21, 5329, ¶¶ 59-70, 84(10)). In support of this ultimate conclusion, the Commission reviewed in detail the various elements of network operations and found that in many respects ABC was far less advantageously situated than NBC and CBS, and that a significant number of these deficiencies could be alleviated by assurance of substantial financial resources. The Commission did not find, as we shall discuss in detail subsequently, that ABC was bankrupt or even that its operations were unprofitable. What it did find was that ABC's capability of serving the public interest would be substantially enhanced by the assurance of adequate financial backing.

The Commission found that ABC is presently the only national network without its own research, development and manufacturing facilities (R. 5304-05, ¶ 33). It found that ABC, with many fewer primary affiliates and significantly less audience coverage, has long been at a competitive disadvantage vis-a-vis NBC and CBS and that such disadvantage has had adverse effects on the public inter-

est.<sup>41</sup> Moreover, the Commission found that foreseeable trends in the industry make ABC's competitive position worse today in some respects than it has been in the past (R. 5317-19, ¶¶ 63-67). ABC's facilities were found by the Commission to be obsolescent and "significantly inferior to those of the two competitive networks" (R. 5319, ¶ 67). The evidence fully supports these findings.

*Financial Analysis.* The Commission's comprehensive revenue and profit analysis of ABC and its rival networks was in no sense erroneous or misleading, as the Division charges. It is the Division's analysis rather that is misleading. For example, it argues that ABC's market share since 1961 "has varied within only a few percentage points of the 27.5% it held in 1966" (Brief, p. 27). What the Division chooses to overlook is that ABC's market share has declined from the 1961 high of 30.6%. Moreover, reference to "only a few percentage points" is misleadingly simplistic when it is realized that in 1966 each percentage point represented \$10 million in revenue (BB1, R. 4319).

ABC in recent years has annually lagged as much as \$80 million behind its competitors in gross revenues and this revenue gap has consistently widened (R. 5316, ¶ 59). The Commission also found that each of the other two

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<sup>41</sup> ABC was organized in 1943 to acquire, under FCC supervision, NBC's Blue Network and certain radio stations which NBC was ordered to divest (FCC Order No. 107, Docket No. 5060). It began a television network service in the late 1940's, but lack of capital and an inadequate number of outlets prevented it from becoming a truly competitive third network. In the summer of 1951, ABC worked out a merger agreement with United Paramount Theaters, a company with substantially greater financial resources than were available to ABC. The Commission approved this merger in 1953, concluding that it would "provide ABC with the financial resources to carry out its plan to strengthen its programming and improve its physical plant and thereby provide substantial competition to the other networks . . ." *Paramount Television Productions, Inc.*, 17 F.C.C. 264, 352 (1953). Subsequently, in 1960, out of concern for the inadequate market outlets available to ABC, the Commission initiated its so-called "drop-in" proceedings designed to increase the number of VHF stations. The program was ultimately abandoned for technical reasons (Report and Order re VHF Drop-Ins, 25 RR 1687 (1963), *reconsideration denied*, 1 RR 2d 1572 (1963)).

networks regularly earned substantially greater profits than ABC (R. 5316, ¶ 60). ABC's share of all network television broadcasting profits has shrunk from over 20 percent in 1960 to approximately 10 percent in 1966 (BB1, R. 4319). Moreover, in terms of network operations, without regard to individual stations, ABC alone among the three networks has continued to show a loss in recent years while the network profits of its two competitors have shown an increase. In 1966, ABC's loss from network operations was \$9 million (R. 5316, ¶ 59). The importance of these comparative figures, as the Commission found, was that ABC was significantly less able than the other two networks to engage in public service programming, which traditionally constitutes a heavy drain on any network's resources (R. 5317, 5321, ¶¶ 62, 70).

*Coverage.* In analyzing ABC's position in the network industry the Commission considered its coverage in comparison to that of the other networks and particularly noted ABC's weaknesses in the area of primary affiliations. In over one-third of the 150 largest markets in the United States, ABC does not have equal access to the audience.<sup>42</sup> In terms of primary station affiliations, ABC has 137 affiliates compared to 192 for CBS and 206 for NBC (ABC Ex. 30, Tr. 70). The significance of these comparisons, in the Commission's determination, was that they disclose a substantial competitive inequality between ABC and the other two networks which will continue to operate as an obstacle to ABC's efforts to provide a superior public service (R. 5317, 5318, 5319, ¶¶ 62, 65, 66).

The Division seeks to discredit the Commission's reliance upon these competitive comparisons by urging that ABC is free at all times to obtain "clearance" from stations that have primary affiliations with the other two networks. Indeed, the Division goes so far as to assert that ABC may

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<sup>42</sup> In 74 of the top 150 markets in the country there are insufficient stations to permit the three networks to have equal facilities. In 54 of these 74 markets, ABC is the disadvantaged network [AR62, 62(A) R. 1265-70; Tr. 3402, 3425-36.]

be able to achieve competitive parity through such clearances (Brief, pp. 30-31). The Commission properly rejected this theory of the Division. In the first place, it ignores the important long-range advantages attached to primary affiliations. The record shows that in the matter of program promotion and acceptance of news and daytime programs stations usually support the network with which they are primarily affiliated. The experience of ABC is that where it must rely on secondary affiliates its ability to obtain clearances for news and daytime programs is sharply curtailed (Tr. 3385-88). The record discloses many other disadvantages to clearances as compared to primary affiliations in terms of successful network operations, including the fact that even when a clearance is obtained the cleared program will frequently be run at a time period that will result in greatly reduced audience potential (Tr. 3394-95).

Advertisers pay for audience rather than coverage. And the full answer to the Division's claim that through clearances ABC can compete effectively with the other networks that are able to rely more heavily on primary affiliations is seen in a comparison of the prices the three networks are able to obtain for their time. Because it reaches an appreciably smaller audience ABC receives for its time an average of \$3400 a commercial minute less than the other networks.<sup>43</sup> What this means is that during the year 1966, for example, ABC received \$26 million less than the other networks for sale of its prime time and \$47 million less for sale of its programs during daytime (AR63, R. 1271-4). Since ABC is required to incur all the expenses of maintaining its schedule of television programs these figures represent a substantial loss of profits that could have been utilized in improving news, public interest and entertainment programs (Tr. 112-13).

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<sup>43</sup> ABC's facility charges are also less than the other networks. For example, its charge for a Class A hour averages \$34,000 less than the NBC and CBS charge (Application Ex. I-3, Attachment H, p. 17, R. 5828).

*Operating Costs.* The Commission found that a primary reason for ABC's financial need is the "tremendous and increasing costs of television programming and equipment" (R. 5317, ¶ 61). This ultimate finding is supported by detailed subsidiary findings as to ABC's costs for entertainment programming, feature films, public service programs, and news and public affairs programs (R. 5317, ¶¶ 61-62).<sup>44</sup> In the face of these findings, which are undisputed matters of record, the Commission's conclusion that additional financial resources would better enable ABC to meet the rising costs of programming and enhance its ability "to take the risks and make the judgments necessary for the forward progress of ABC's news, public affairs, and other similar programming or related endeavors" is unexceptionable (R. 5320, ¶ 69). The fact that ABC has in the past achieved a measure of success in news, entertainment, feature films, cultural programs and other costly endeavors does not detract from the Commission's conclusion that additional financial resources will put ABC in a better position to provide quality public service. The margin for experimentation and innovation in ABC's present operations is exceedingly narrow. In

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<sup>44</sup> The undisputed evidence in the record establishes that the average cost for an hour film show rose from \$94,000 in 1960 to \$127,000 in 1964, to \$165,000 in 1966-67 (Application Ex. I-3, Attachment H, p. 20, R. 5828; Tr. 3314); that ABC's annual entertainment program expenditures have increased from \$130 million in 1964 to \$170 million in 1966, an increase of 30% (AR46, Attachment B, R. 1148); that ABC's sports program expenditures rose from approximately \$10 million in 1964 to over \$20 million in 1966, and, because of ABC's plan to cover the Olympics, are tentatively budgeted for \$38 million for 1968 (*Ibid.*; Tr. 112, 265); that the increase in use of feature films has necessitated enormous expenditures, as illustrated by the contract recently negotiated by NBC under which it will pay \$115 million to United Artists for the television rights to a series of feature films (Tr. 2433-2438); and by the fact that ABC will be required to spend a minimum of \$70 million through 1970 to hold its feature film inventory at its present level (AR3, R. 141; Tr. 2434, 2557-58); that cultural program innovations are likewise costly, as illustrated by ABC's "Stage '67" which cost \$10 million to create and lost \$4 million (Tr. 1515); and, most significantly, that ABC's news and public affairs programs resulted in a deficit of \$18 million in 1966, with greater losses anticipated in future years (Tr. 113-14, 1666; AR46 A, B, C, R. 1147-49).

1966 its total pre-tax profit from all broadcasting operations was approximately \$20.4 million (BB1, R. 4319). In that same year its loss on news and public affairs was nearly \$18 million (Tr. 1666; AR46, A, B, C, R. 1147, 1148, 1149). It is apparent that a limited number of miscalculations in the highly unpredictable field of network broadcasting would demand an immediate and substantial retrenchment in news and public affairs programs.

*Capital Requirements.* ABC has substantial capital requirements that must be met if it is to continue to meet its public service obligations. The Commission, with its special knowledge of the needs and requirements of the television industry, found that "the ABC studios, production facilities and technical equipment are significantly inferior to those of the two competitive networks", that ABC faces "rising and substantial" capital and operating expenditures, that the most significant needs are those of the Broadcasting Division including the cost of converting its existing facilities to color and developing new complexes in New York and Hollywood, that the expenditures "have been dictated by the industry-wide trend to color [and] the obsolescence of ABC's present production plant" and that the projected expenditures represent "responsible business judgments" (R. 5319, ¶ 67). The Division does not challenge ABC's need for capital. It concedes that "the other networks may have more modern spacious facilities" (Brief, p. 32) and acknowledges that "obviously ABC will have capital needs for studio equipment and other facilities" (Brief, p. 34).

The Division attacks the Commission's determinations with respect to ABC's projected capital requirements on the ground that it made no specific subsidiary finding on the allegedly "hotly-contested issue" of whether ABC's capital projections were "merely afterthoughts devised to convince the Commission of the desirability of the merger" and because it made no specific dollar amount findings as to the amount of ABC's capital needs (Brief, p. 34).

The Commission expressed sharp disagreement with the Division's "afterthought" contention but found it unnec-



essary to decide the matter since "the record of the supplementary proceeding establishes beyond any real dispute that ABC faces rising and substantial expenditures for both capital and operation requirements" (R. 5319, ¶ 67). The Commission was not required to make a finding on the issue whether the particular estimates of capital requirements presented to the Commission were "afterthoughts". The relevant and material issue was not whether the parties had prepared certain estimates of capital requirements before the proceeding or for the purposes of the proceeding but whether in fact ABC did have substantial financial requirements for both operating and capital purposes. The Commission's finding that ABC had such requirements is fully supported by the record.

ABC's plans to colorize its studios and to build new studio complexes in New York and Los Angeles were initiated long before the merger agreement and the "great expense" of these capital developments was specifically cited in a contemporaneous memorandum as a motivation for merger with ITT (AR2, R. 137). An ABC forecast, prepared in October, 1965, well before the merger agreement, showed projected capital expenditures for its Broadcasting Division in the amount of nearly \$20 million for the fourth quarter of 1965 and the first two quarters of 1966 (AR40, Attachment 14, R. 786). Subsequent capital projections prepared by ABC further demonstrate that its need for capital is substantial and real.

In July of 1966, ABC advised the Commission that it faced expenditures of approximately \$90 million for constructing and equipping new studio complexes in New York and Los Angeles, the planning for which had started in December, 1964 (AR6, 7, 8, 9, 10, 11, R. 198, 203, 212-3, 214-5, 216-22, 223), \$34 million for equipment needed to convert the network to color, and \$17 million to purchase and furnish an office headquarters building in New York. This estimate was cited by the Commission in its original decision, but by the time of the supplemental proceeding, it had been superseded by more detailed projections relat-

ing these needs to time periods. The first of these was prepared in November, 1966, after the hearing before the Commission had been completed but before the Division had intervened. It showed anticipated Broadcast Division capital expenditures of \$57.6 million for the balance of 1966 and for the two years 1967 and 1968 (AR25A, R. 365).

In January, 1967, after the Commission had approved the merger but still before the Division had entered the case, an ITT official working with ABC on its plant development program submitted to ITT management a "slightly updated" version of the November report. At the same time, he reported that he was working with ABC personnel in preparing a "complete plan" that would bring "the ABC plant up to full color and into a competitive position with the other networks" (J257, R. 3249). This complete plan, which was being finalized in accordance with action by the Executive Committee of ABC on December 19, 1966, before the Division intervened, was completed on February 8, 1967 (AR3B, R. 164; Tr. 2277-78, 2302-3, 2543-5, 2780-81). It updates and extends through four years the incomplete two-year projections prepared in November and is basically consistent with the November report. The February report estimated Broadcasting Division capital expenditures of approximately \$58 million during 1967 and 1968, as compared to the November report's two-year estimate of \$57,609,900. For 1969-1970 the four-year February plan projects similar expenditures of \$54,736,000 (*cf.* AR25A; 3B, R. 365; 164).

It is these documents—the November, 1966 capital forecast, the January 13, 1967 memorandum indicating that a complete report was being finalized, and the complete report itself—that were the principal evidence before the Commission as to the extent of ABC's immediate capital requirements. The Commission found that these projections were accurate and reliable evidence as to the extent of ABC's capital needs. Thus, it found that the extent of ABC's capital needs were shown "by detailed and voluminous itemized schedules . . . [and] that these financial forecasts and their supporting schedules represent

responsible business judgments" (R. 5319, ¶ 67); it further found that these expenditures related primarily to the costs of "converting existing facilities to color and developing new complexes in New York and Hollywood" and were "dictated by the industry-wide trend to color, the obsolescence of ABC's present production plant, and the necessity of providing high quality and competitive programming" (*id.*, note 4). While noting that "it is always possible to raise questions about particular items in such lengthy schedules," the Commission concluded that "delineation of the exact amount of the required expenditures is not crucial to our decision" (R. 5319-20, ¶¶ 67-68).

This conclusion is plainly correct. Despite the Division's persistent efforts to frame the issue here in terms of narrow, rigid questions as to ABC's precise dollar needs and resources, the Commission's public interest determination rests on broader considerations. Thus, as noted above, in approving the merger the Commission considered not only the "tremendous and increasing cost of television programming and equipment" (R. 5317, ¶ 61), but also such matters as ABC's technological disadvantage, the advantages to broadcasting technology promised by ITT's greater interest in the field, the anticipated benefits to UHF broadcasting, and, in general, ABC's greater ability to compete with its larger rivals and to bear the expenses (and losses) and take the risks involved in expanded news, public affairs, and cultural programming (R. 5320, ¶ 69). In these circumstances, there was no regulatory purpose that would have been served by any more refined dollar amount determinations than are necessarily reflected by the Commission's overall acceptance of the ABC capital need schedules. *Chicago & Northwestern Ry. Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 326, 345-7 (1967); *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86, 96-7 (1953). Moreover, the Commission was here dealing with estimates and projections of future requirements as related to other estimates and projections of ABC's available sources of funds. No claim of precise accuracy was or could have been advanced for projections of this character,

and in such circumstances, any precise dollar determinations the Commission would make would of necessity have had an illusory precision.

While, as noted above, the Division concedes that "the other networks may have more modern, spacious facilities" (Brief, p. 32), it argues, without specific evidentiary support, that the capital projections "greatly exaggerate its [ABC's] actual requirements" (Brief, p. 33). The Commission, however, with its special knowledge of the needs and requirements of the television industry, found that "the ABC studios, production facilities and technical equipment are significantly inferior to those of the two competitive networks," that expenditures listed on the ABC schedules "represent responsible business judgments," and that such expenditures include the cost of developing "new complexes in New York and Hollywood," and were dictated by, among other things, the "obsolescence of ABC's present production plant . . ." (R. 5320, ¶ 69). The substantial evidence in this record fully supports these findings.<sup>45</sup>

Two basic misconceptions appear to underlie the Division's attack upon the Commission's determination that the availability of substantial capital from ITT will significantly enhance ABC's ability to serve the public. The fact that ABC is presently conducting a profitable operation, in the view of the Division, goes far to establish that the merger should be disapproved. In this respect the Division treats the Commission's approval of the merger as if it were based

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<sup>45</sup> For example, an outside engineering firm, the Austin Company, retained by ABC in 1964 to study its New York production setup, found that 12 of the 14 buildings on its New York production site should be demolished as unusable, marginal or incapable of substantial modification, and that ABC's operating efficiency was being impaired by the use of "outdated buildings," and by "the splitting of functions, portions of which are presently housed in satellite locations, causing difficult coordination and communication which results in efficiency loss" (AR39, R. 558, 579-83). While certain of the items listed in the capital projections, such as modernization of the Colonial Theater or an equivalent substitute and procurement of video tape recorders are admittedly contingent, they are of marginal significance and their elimination would not materially affect the total projected needs.

upon the "failing company" doctrine which sanctions a merger that might otherwise be illegal if it serves to rescue one of the participants from bankruptcy. *Cf. International Shoe Co. v. Commission*, 280 U.S. 293 (1930). The Commission's decision rests on quite different grounds and is made in the discharge of its statutory obligation to promote the public interest in broadcasting.<sup>46</sup>

Even though its operations are profitable, ABC is under disadvantages in discharging its public service obligations. Certain of those disadvantages can be eliminated or reduced by allowing it an infusion of financial strength. That infusion is desirable, the Commission has found, not because without it ABC will go broke, or because increased financial strength for ABC is in and of itself a desirable objective. That infusion is desirable because it will enable ABC to provide a significantly improved broadcasting service which will in turn serve the public interest. Thus the Division's preoccupation with ABC's present profitability misses the real thrust of the Commission's determination.

The Division's second misconception lies in its refusal to recognize that the financial strengthening of ABC will redress the disadvantages under which it is now operating and thereby enhance its capacity to perform more effective public service. It is agreed that broader coverage is one of ABC's principal needs for effective public service. The Division asserts that more popular programming is the path to improvement in this important aspect of network operation (Brief, p. 31). It fails to recognize, however, that the availability of funds in substantial amounts and the protection afforded by substantial capitalization are vital ingredients of improved programming. The Commission did not base its approval of the merger on any ex-

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<sup>46</sup> On a petition to review an order of the Interstate Commerce Commission approving the merger of "two healthy, stable railroads" the Court, in rejecting the Division's suggestion, refused to rule that in discharging its function of promoting the public interest the Commission was limited in any way by the failing company doctrine. *Florida East Coast Ry. Co. v. United States*, 259 F. Supp. 993, 1010 (M.D. Fla. 1966), *aff'd*, 386 U.S. 8 (1967).

pectation that financial strength would, without more, enable ABC to improve its programming. Such strength will, however, enable it to undertake expensive, risky improvements and innovations in all types of programming. If it is skillful and fortunate it may in this manner extend its coverage, and in any event, the public will be better served by its efforts toward that objective. That such reasoning formed an important basis for the Commission's determination appears from the following finding:

"It is true that the proposed merger does not directly meet the need of ABC for better facilities and more affiliates. However, the record establishes that it will strengthen the financial position and technical resources of ABC and thus permit it to expand its staff, particularly in the field of news, to take greater risks and make long range commitments for programs, to offer affiliates and prospective affiliates greater assurances regarding future programming, to change to color transmission of television and improve its technical facilities more rapidly than otherwise, and to encourage the development of UHF outlets. All of these things will certainly tend to attract affiliates and permit ABC to compete more effectively for affiliates. We believe that our statutory mandate requires us to permit this, and that this will result in greater competition among broadcasting networks to the benefit of the public." (R-87, ¶ 35)

**B. It Was Not Essential to the Validity of the Commission's Determination to Find that ABC Could Not Have Obtained Financial Assistance Other Than Through Merger with ITT**

The Division contends that the Commission erred in not deciding whether alternate financing was available to ABC on practical terms (Brief, pp. 34-37). In posing this issue, the Division once again seeks to compress the public interest aspects of the proposed merger into the mold of isolated questions, *i.e.*, does ABC need money, and if so,

can such money be obtained only from ITT? The case, however, does not lend itself to any such rigid inquiries, and the Commission's determination properly rested on consideration of the entire range of public interest benefits already described.

In dealing specifically with the public benefit from adding ITT's financial resources to ABC, the Commission noted ABC's comparative weakness and found that it would "be significantly aided by having ITT's financial strength back of it, in such matters as its attempts at cultural programming innovation, news and public affairs expansion, ability to chance more or sooner primary affiliation with UHF stations . . ." and that merger with ITT would promote an environment in which ABC would be able to "take the risks and make the judgments necessary for the future progress of ABC's news, public affairs, entertainment and other similar programming . . ." (R. 5320, ¶ 69). These benefits, together with the anticipated benefits to broadcasting technology and UHF, fully justify the Commission's conclusion that merger with ITT was in the public interest, whether or not ABC might on some terms be able to finance its foreseeable requirements through other means.

The Commission did recognize that requiring ABC, which it found to be "already heavily burdened with senior debt" and unable to finance the required expenditures through its own "cash generation" (R. 5320, ¶ 68), to resort to outside financing would present significant risks and hazards that could be avoided by the merger. Specifically, the Commission found that "adverse developments [in areas of cultural programming innovation, news and public affairs and UHF] or new technological developments could be a most serious matter to ABC, if it were to shoulder new substantial financial burdens in addition to its already high debt ratio." "Such an atmosphere," the Commission concluded, "would not appear conducive to risk in the public interest areas we have described" (R. 5320, ¶ 69).

By raising the question of alternatives, moreover, the Division asks the Commission to become overseer of licensee financing to an extent unwarranted by the public interest.



The Communications Act contemplates that the Commission shall determine whether the particular license transfers pending before it would "serve the public interest, convenience and necessity." The Act explicitly directs that the Commission "may not consider whether the public interest, convenience and necessity might be served by the transfer—to a person other than the proposed transferee." Section 310(b). As stated in the House Report explaining the Amendment, the Act contemplates that the Commission consider the pending application "as though no other person were interested in securing such permit or license." H. Rep. 1750, 82d Cong., 2d Sess., Apr. 8, 1952.

Similar considerations should apply with respect to financing alternatives. The issue before the Commission was whether this proposed transfer is in the public interest, not whether other alternatives were available to ABC. The Commission was satisfied that the merger served the public interest, convenience and necessity for the reasons stated, was satisfied that this merger would be the "most readily available" course of financing, and saw significant drawbacks to requiring ABC to shoulder additional financial burdens (R. 5320, ¶¶ 68-69).

The Division's argument assumes that the public interest would be better served by adding to ABC's already heavy burden of senior debt than it would by internal generation of the necessary financial resources following merger with ITT. As a matter of economics, this is certainly not a proposition that can be taken for granted. Most businesses, and regulatory agencies as well, regard the incurring of heavy debt with something less than complete enthusiasm. We are not aware of any expertise in the Division that would warrant the assumption that in network broadcasting, heavy debt provides a desirable financial structure. On the other hand, the Commission has had considerable exposure to financial problems, both in the regulation of broadcast operations and in the regulation of common carriers. Its unwillingness to find that the public interest would be served by further extensive borrowing by ABC is, accordingly, entitled to particular weight.

The Commission's appraisal of the financial aspects of the proposed merger is attacked by the Division on grounds that center around the circumstances that ITT is a large diversified company that has a variety of commercial interests (Brief, pp. 37-39). The Division variously urges that the Commission was not sufficiently aware of the alleged danger to the public interest in licensing such a company and that the Commission assumed that benefits would flow merely from the fact that ITT was large and had many interests. Neither charge fairly describes the Commission's decisional process. The Commission assumed nothing. It fully appreciated, and weighed, every risk or disadvantage that was urged with respect to ITT's participation in broadcasting. Indeed the extensive discussion in the Division's own brief makes clear the detailed consideration the Commission gave to every apprehension expressed by the Division, however speculative. The Commission, it might be observed, is no novice in the matter of diversified companies. The other two networks, NBC and CBS, as well as many of the major broadcast licensees, have substantial interests in fields other than broadcasting. And the Commission has had considerable experience in judging whether the existence of such other interests constitutes a bar to provision of public service by a licensee. It has for many years concluded that large companies with diversified interests may qualify as broadcast licensees. What the Commission did not do in appraising this merger, and perhaps this is the essence of the Division's complaint, was to determine, either explicitly or implicitly, that because ITT was large and diversified it should be barred from broadcasting. Such a ruling would have been completely inconsistent with the course of regulatory decisions followed by the Commission since its creation by Congress.

**C. The Findings and Evidence Support the Commission's Determination that the Merger will Result in Significant Public Interest Benefits in the Area of Communications Technology, Including UHF Broadcasting**

The Commission found that the merger will " \* \* \* strengthen ABC technologically, increase competition in the American broadcasting equipment and technology field, and assist UHF development" (R. 5329, ¶ 84(5)).

Despite its extensive resources in some fields of communications technology, ITT has not previously had the economic incentive to engage in the development and manufacture or distribution of broadcast transmission or receiving equipment in the United States. The Commission found that as a result of the merger ITT will have strong economic incentives to direct its undisputed substantial capability in communications technology to research and development of technology and manufacture of equipment that will be of use to ABC and will help to keep ABC in the forefront of technological development (R. 5303-04, 5305-07, ¶¶ 30, 34-38).<sup>47</sup>

In these circumstances and in recognition of the specific projects and tasks which ITT has already initiated or planned in support of ABC, the Commission affirmed that

" \* \* \* the merger will greatly strengthen ABC technologically, will produce increased research and technological development in this field by ITT and thus will result in significant and important technological advances that the American public might otherwise be denied" (R. 5306-07, ¶ 37).

While the Commission stressed UHF broadcasting as the principal example of the type of technological assist-

<sup>47</sup> The Commission found in appraising ABC's competitive position in network operations that "ABC is the only one of the three television networks without research, development and manufacturing facilities in its own field," and that as a result, ABC is "dependent upon RCA, or other suppliers, for its equipment and technology." Both of the competitive networks, on the other hand, have ready access to research and development, NBC through its parent RCA, and CBS through its laboratory division (R. 5304-05, ¶ 33).

ance ITT will provide ABC, it found that there were additional areas of broadcast technology within the competence of ITT. It noted approvingly the statements in an ITT report that its laboratories would be used to solve numerous other immediate problems of ABC and to provide technical know-how to help lead broadcasting into such specific possibilities as direct television broadcasting from satellite to home, utilization of modulation techniques, large-screen, three-dimensional television, microminiaturization of equipment to permit coverage of all types of news or national events, and the development of techniques of hard copy printouts, such as newspapers to the home (R. 5305-06, ¶ 36). Finally, in appraising the technological benefits promised by the merger, the Commission stressed the coincidence of ABC's and ITT's interests pointing to the fact that it was clearly to the interest of both companies to have a strong, efficient, economically operated, and technologically advanced television network (R. 5311, ¶ 47). All of these considerations supported the Commission's finding that

“Indeed one of the most important aspects of the proposed merger is that it will permit ABC to cope with advancing technology and maintain a competitive position which it might be unable to do otherwise” (*Ibid.*)

The evidence of record fully supports these findings. We have discussed at pages 31-37 above the Division's speculations as to the anticompetitive consequences in the general area of communications technology. We deal in the following section with the Division's attack on the Commission's conclusion that the merger promises substantial public benefit through development of UHF broadcasting.

**1. *The Commission Correctly Found That the Merger Would Significantly Enhance the Development of UHF Broadcasting with Consequent Substantial Benefits to the Public***

The Commission found that ABC, buttressed by the resources and backing of ITT, would be able to affiliate an increased number of UHF stations in markets where ABC does not presently have a primary affiliate—to the benefit of UHF broadcasting generally (R. 5321, ¶ 71). Additionally, the Commission found that ITT's extensive technical capacity, particularly in research and development, would lead to an enhancement of UHF technology to the benefit of ABC, which is dependent on UHF to become fully competitive, and to the benefit of UHF broadcasting generally (R. 5322, ¶ 72).<sup>48</sup>

Mr. Goldenson's letter of July 25, 1966, describing benefits which would flow from the merger, pointed out that ABC, with its limited outlets and coverage, has a tremendous stake in the growth and development of UHF as the means to remedy that coverage deficiency. The letter goes on to point out that with the resources and backing of ITT, ABC could "speed up the growth and development of UHF, particularly in markets limited to one or two VHF stations." Mr. Goldenson also referred to the technological assistance which ITT could provide to ABC and, indirectly, to other stations and networks (Goldenson July 25, 1966 letter, p. 7, R-23). Similarly, Mr. Geneen's letter of July 25, 1966, referred to ITT's readiness and ability "to give substantial technical support to ABC in the fields of telecommunications and electronics"—citing the fact that in 1966 ITT would spend \$180 million for research and development work alone (Geneen July 25, 1966 letter, p. 2, R-24).

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<sup>48</sup> The Commission also found that programming improvements for ABC, flowing from the merger, can be expected to increase the capacity of ABC's UHF affiliates to attract audiences and advertisers, and thus to "strengthen UHF's competitive potential" (R-87, ¶ 29). The Division has not challenged this finding.

The foregoing views were affirmed and supported during the hearings, in the course of which principals of the applicants delineated in greater detail the respects in which these benefits would materialize. Mr. Goldenson testified that in many of the more than 100 markets where ABC has only a secondary television affiliation, it expects, following the merger, to enter into a primary affiliation with a UHF station. He stated:

"Reduced to its essence the plan of the combined ITT-ABC is to establish a network which is truly competitive with NBC and CBS—in terms of homes reached, share of audience, share of billings, hours of programming per day and most importantly in news, special events and public affairs. This will mean more affiliates, many in the UHF band" (Tr. 111).<sup>49</sup>

The record shows that ABC's support of UHF development through affiliating UHF stations in one or two-VHF station markets (rather than sharing a VHF station on a secondary affiliation basis) may involve a short-run loss in advertising revenues. With the backing of ITT resources, however, ABC will be able to pursue its long-range interest in granting such affiliations. In turn, the attraction of ABC programming will be an important means of inducing the public to make the requisite set conversions, antenna installations and use of the UHF portion of television receiving sets, which will ultimately further UHF's development as a fully competitive service (Tr. 273, 318-20, 326, 1668).

The record also shows that ITT has exhibited not only a technological competence, but also a strong interest in

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<sup>49</sup> The Division refers to ABC counsel's statement that "it would be a disservice" to ABC for it not to obtain VHF primary affiliations where available (Brief, p. 42). This statement, however, was followed by the assertion that such "opportunities are restricted" and that increasingly ABC "will be relying on U's" (Tr. 205). This evaluation is fully consistent with applicants' representations that the merger will lead ABC to more UHF affiliations.

advancing UHF technology (Tr. 513-14, 522-23, 584, 1941-53, 1982-83, 1986-89, 2060; 2749; 2836-37, 2842-46, 2851, 2856-57, 2861-63, 2868, 2874). Among the UHF technological problems to which ITT has given consideration are the following: design of high-power transmitting antennas; propagation and antenna coverage studies having special applicability to site selection and allocation activities of the affiliated stations; filling in shadows, which are a particular problem with UHF, by the more advanced application of retransmission systems; automation and control of UHF station operations; development of inexpensive very wide band receiving antennas designed to give equivalent performance over the whole VHF/UHF spectrum; and development of a new type of foam dielectric cable designed to reduce the transmission loss over the whole UHF band down to that normally experienced in low VHF bands (J262, R. 3362-66). Moreover, ITT has committed itself, after the merger is consummated, to conduct under ABC's direction a comprehensive systems analysis of one or more pilot UHF markets to study the many technical problems presented (Tr. 1943-45; 2846-47).

The Division does not challenge the Commission's analysis of ABC's need for additional outlets, available only through improvement of UHF, or ITT's competence to make significant contributions to UHF broadcasting. It suggests, however, that the Commission cannot reasonably anticipate benefits in UHF as the result of the merger because, under the Division's assumption, the "long-range" interests of ABC-ITT will be disserved by full development of UHF (Brief, pp. 40-41). The Division's reasoning is that, if there should ever be a substantial increase in the number of available channels, there would be room for additional networks, and ABC might then be faced by competition not only from NBC and CBS, but from unidentified new networks. Therefore, the Division suggests that ABC-ITT, out of fear of this new competition, will forego UHF development, which is essential to its growth, and resign itself to being a poor third in the competition among existing networks.



The Commission rejected this defeatist psychology. It concluded that there was nothing in the history of either ABC or ITT that supported such apprehensions; indeed both companies had records of aggressive competition. Moreover, simply as a matter of competitive reality, the pressures upon ABC-ITT, today and tomorrow, from the activities of NBC and CBS will demand aggressive and imaginative response. Apprehensions about unpredictable competitive conditions several years in the future can hardly equal in motivating power the need for immediate activity to keep from falling further behind existing strong competitors.<sup>50</sup>

The pre-merger record of ABC in the utilization of UHF provides solid support for the Commission's conclusion that the merged company will continue to exploit the potential in that field of broadcasting. The record shows, and the Commission found, that ABC is at a significant competitive disadvantage in comparison with NBC and CBS, and that its hope for achieving comparable outlets for its programming throughout the country depends upon the development of UHF (R. 5305, ¶ 35; Tr. 92, 107-09, 111, 227, 274-77, 316). Hence, it is this consideration which has led ABC to support generally the development of more television outlets in all the markets of the country, and in particular UHF as the available means to this result. Thus, during the 1950's, ABC consistently took the position that the Congress and the Commission should pursue regulatory policies designed to increase the number of television out-

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<sup>50</sup> The incentive to increase coverage through UHF development, and in turn to increase revenues, is magnified by the fact that, with program costs relatively constant, such incremental revenues tend to take the form of profit. The ABC Television Network has operated at a loss for the past four years, while the NBC and CBS Television Networks have had combined profits during those years of \$282 million (BB1, R. 4319).

lets and enhance the development of UHF television.<sup>51</sup> When the question of the future of UHF television was posed in the early 1960's, in connection with proposed legislation before the Congress, ABC supported the so-called all-channel receiver legislation.<sup>52</sup> ABC also supported proceedings before the Commission to "deintermix" various television markets, by making the stations in those markets all UHF in the best interest of fair competition. See ABC Comments in FCC Docket Nos. 14239-46, filed February, 1962.

In short, ABC has consistently supported measures designed to increase the number of television outlets generally and to aid UHF television specifically. Such a record—unrelated to the merger application—is substantial assurance that the applicants' projected continuing support for UHF is bona fide and in their own economic interest.<sup>53</sup>

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<sup>51</sup> See *Status of UHF and Multiple Ownership of TV Stations*, Hearings before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, U. S. Senate, 83d Congress, 2d Session, pp. 939-61 (1954); *Television Inquiry*, Hearings before the Committee on Interstate and Foreign Commerce, U. S. Senate, Part II, *UHF-VHF Allocation Problem*, 84th Congress, 2d Session, pp. 753-81 (1956); *Television Inquiry*, Hearings before the Committee on Interstate and Foreign Commerce, U. S. Senate, 85th Congress, 2d Session, Part 6, pp. 4338, 4343 (1958).

<sup>52</sup> See *All-Channel Television Receivers*, Hearings before the Communications Subcommittee of the Committee on Commerce, U. S. Senate, 87th Congress, 2d Session, pp. 250-51 (February, 1962); *All Channel Television Receivers and Deintermixture*, Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 87th Congress, 2d Session, pp. 297-311, (March, 1962) which was subsequently passed by the 87th Congress and enacted into law. See 47 U.S.C. § 303 (s).

<sup>53</sup> ABC has generally opposed various proposals for direct Commission regulation of network broadcasting on the ground that whatever need existed for such regulation would be largely relieved with the advent of more television outlets, thereby increasing the opportunities for greater competition in broadcasting and more networks. See, e.g., Comments of ABC in Docket No. 12782, filed May, 1966.

**2. *There Was no Error in the Commission's Imposition of and Reliance upon Conditions Designed to Better Assure UHF Development***

The Commission accepted the representations of ABC and ITT as to their intentions with respect to the increased utilization and development of UHF broadcasting (R. 5306-08, 5321-22, ¶¶ 37, 38, 71, 72). In view of the significance of such efforts not only to the merger but in broadcast regulation generally, the Commission imposed conditions that were designed to assure that the parties' representations would be fulfilled and at the same time to keep the Commission adequately informed of the progress being made. The representations which these conditions assure are that ABC, in certain markets left to its determination, forsake reliance upon secondary clearances from VHF stations in favor of primary affiliations with UHF stations, and that ITT make a substantial entry into the American UHF field. Annual detailed reports on both lines of activities are required to be submitted to the Commission for three years following consummation of the merger (*Ibid.*).<sup>54</sup>

The Division argues that the Commission improperly relied upon these conditions as a source of benefits, and also urges that even if such reliance were justifiable in principle, the conditions imposed were vague and uncertain and hence inadequate. The essential flaw in this argument is the assumption that the UHF benefits found by the Commission flowed from the conditions it imposed. In fact the benefits in question were grounded upon both the representations and the clearly established self-interest of the applicants. The conditions were designed merely to assure performance and to keep the Commission adequately and currently informed.

From the beginning of this proceeding the applicants have represented that the merger would benefit UHF.

<sup>54</sup> In part, these conditions, which were imposed by the Commission upon reconsideration of its original approval, were in response to the doubts expressed by the Division and the suggestion of one of the dissenting Commissioners (R. 5322, ¶ 72; Dissent of Commissioner Johnson, n. 132 R-87).

These representations were carried forward and expanded upon in the course of both the September 1966 oral hearing and in the Spring 1967 evidentiary hearing. The applicants' Proposed Findings before the Commission in the proceedings on reconsideration contained carefully considered UHF proposals (R. 4595-97, 4603, ¶¶ 5.7-5.8, 6.18-6.20). The Commission's reliance upon these proposals was clearly warranted, as we have shown elsewhere with regard to other representations (*supra* pp. 44-46).

In the exercise of its licensing functions, the Communications Act contemplates that the Commission will obtain from applicants information and representations which will be utilized in its judgment process. Thus, Section 308(b) of the Communications Act provides that applications for station licenses shall, in addition to certain specified information, contain "such other information" as the Commission may require. That such information submitted pursuant to Section 308(b) of the Act is fundamental to the Commission's licensing function is supported by Section 312(a)(1) of the Act, which provides that false statements made in connection with applications are a ground for revocation of a station license.

The act also expressly authorizes the Commission to "prescribe such restrictions and conditions," as may be necessary in carrying out its functions. Section 303(r). The utilization by the Commission in the exercise of its licensing power of conditions imposed under this section was approved by the Supreme Court in *Regents v. Carroll*, 338 U.S. 586, 600 (1950).

This Court in *Office of Communication of United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 340-43, 359 F.2d 994, 1006-9 (1966) neither held nor suggested that the Commission may not utilize conditions in its licensing procedure (See, Brief, p. 45). That case involved renewal of a license by the Commission without a hearing, notwithstanding that the licensee had engaged in serious past misconduct, and without a finding by the Commission that renewal would be in the public interest. The court held that in such circum-

stances it was error for the Commission to substitute for a public interest finding an undertaking by an applicant for renewal to observe the very obligations of a licensee that he had already disregarded. Here there has of course been no improper conduct on the part of the applicants. In addition, the conditions imposed do not merely assure the performance of obligations required of all licensees by the Act. They are directed to performance not otherwise required of licensees. Finally, unlike in the *Church of Christ* case, the Commission's determination here as to the requirements of the public interest has been made after a full hearing and consideration of all aspects of the application before it.

The fact that the Commission's order imposed conditions requiring ABC and ITT to report annually with respect to their implementation of the representations made is likewise fully consistent with ordinary Commission procedure. Section 308(b) of the Communications Act specifically authorizes the Commission to require written submissions to enable it to determine whether a license should be granted or, once granted, revoked. See also Section 403.

In urging that the Commission was fully warranted in expecting accelerated UHF development on the basis of evidence quite apart from the conditions it imposed, we do not suggest that it was in any way improper for the Commission to take such conditions into account in weighing the public benefits promised by the merger. There is no principle of law, as the Division appears to argue (Brief, p. 45), that precludes a regulatory commission from finding a benefit to the public interest in the fulfillment of conditions imposed by the agency. The authority of an agency in this respect is not limited to finding that the public interest will be served by conditions designed "to ameliorate anticipated disadvantages" (*Ibid.*). The agency may attach conditions designed to insure that the benefits to the public interest anticipated by the applicants will in fact occur. See *Tol., P. & Wn. R. Co.—Control*, 295 I.C.C. 523 (1957), *appeal dismissed* 165 F. Supp. 893 (D. Minn. 1958),

*aff'd*, 361 U.S. 173 (1959). And it may impose conditions designed to provide additional benefits not contemplated or proposed by the applicants. See *New York Central Unification*, 150 I.C.C. 278 (1929), *aff'd*, 287 U.S. 12 (1932). The fact that the conditions are attached on the initiative of the regulatory agency and not at the suggestion of the applicants is immaterial. The only relevant consideration is whether they will insure that the public interest will be served by the proposed transaction. Here the benefit is the development of UHF, which has been urged, planned and promised by the applicants themselves. Surely the fact that the Commission chose to underscore the importance it attached to that benefit by imposing conditions does not diminish, but rather enhances its significance.

Finally, the Division urges that the conditions imposed by the Commission are too vague and uncertain to provide a basis for findings of benefit, and that there is no meaningful standard by which the applicants' performance, as reported to the Commission, can be judged. The proposals in question, which the Commission found to constitute benefits flowing from the merger, contemplate future business activities by ABC and ITT. In their very nature, such activities can only be described in somewhat general terms. For example, whether ABC will affiliate a UHF station in Market X or Market Y, or both Markets X and Y, will obviously depend upon a variety of circumstances prevailing at the time.<sup>55</sup> Similarly, whether ITT research and development will come up with one breakthrough in UHF technology or another, or many breakthroughs, does not lend itself to specific prediction in advance; nor does the anticipated timing of such developments.

What is significant is that the conditions are meaningful and readily enforceable in the context of the expertise of

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<sup>55</sup> Appellant urges that the term "a certain number of markets," adopted by the Commission, was used by ABC counsel in oral argument and not by applicants' principals in sworn testimony. The term was counsel's summarization of Mr. Goldenson's testimony (see, e.g., Tr. 92, 111), not an expansion or modification of that testimony. It was fully justified on the basis of the entire record, as was the Commission's finding.

the Commission and its experience with the broadcasting industry. The Commission's records disclose the extent to which ABC has been able to affiliate with UHF stations in the past and, conversely, the extent to which it has had to place reliance upon clearances from high-circulation VHF stations.<sup>56</sup> The Commission also considers from time to time matters such as network affiliation criteria as they bear upon the public interest (see, e.g., Notice of Inquiry in FCC Docket No. 16041). Similarly, the Commission is aware of and sensitive to developments in UHF technology. Based upon its expertise and experience in these areas, the Commission is fully capable of judging whether the applicants' representations and its own expectations have been fulfilled. It is this continuing regulation, coupled with expertise born of many years of experience in the various aspects of broadcasting, which gives added assurance that the representations made will be meaningfully fulfilled, and the imposed conditions understood and observed.

Thus, the Commission's judgment that the projected benefits for UHF would result is entitled to great weight. *American Airlines v. CAB*, 89 U.S. App. D.C. 365, 192 F.2d 417 (1951). Moreover, the Commission's specification that the representations in question "must be fulfilled" (R. 5322, ¶ 72), coupled with the prescribed reporting requirements, give assurance that remedial action will follow any departure from the applicants' representations or the conditions imposed by the Commission. Such assurance "should be accepted and respected by this Court." *American Airlines v. CAB*, 98 U.S. App. D.C. 348, 354, 235 F.2d 845, 851, cert. denied, *Air Coach Transport Ass'n. v. American Airlines*, 353 U.S. 905 (1956).

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<sup>56</sup> 47 C.F.R. 1.613(a) requires that network affiliation agreements be filed with the Commission.



## CONCLUSION

For the reasons stated above the Commission's orders are supported by adequate findings and substantial evidence, and they should, therefore, be affirmed.

Respectfully submitted,

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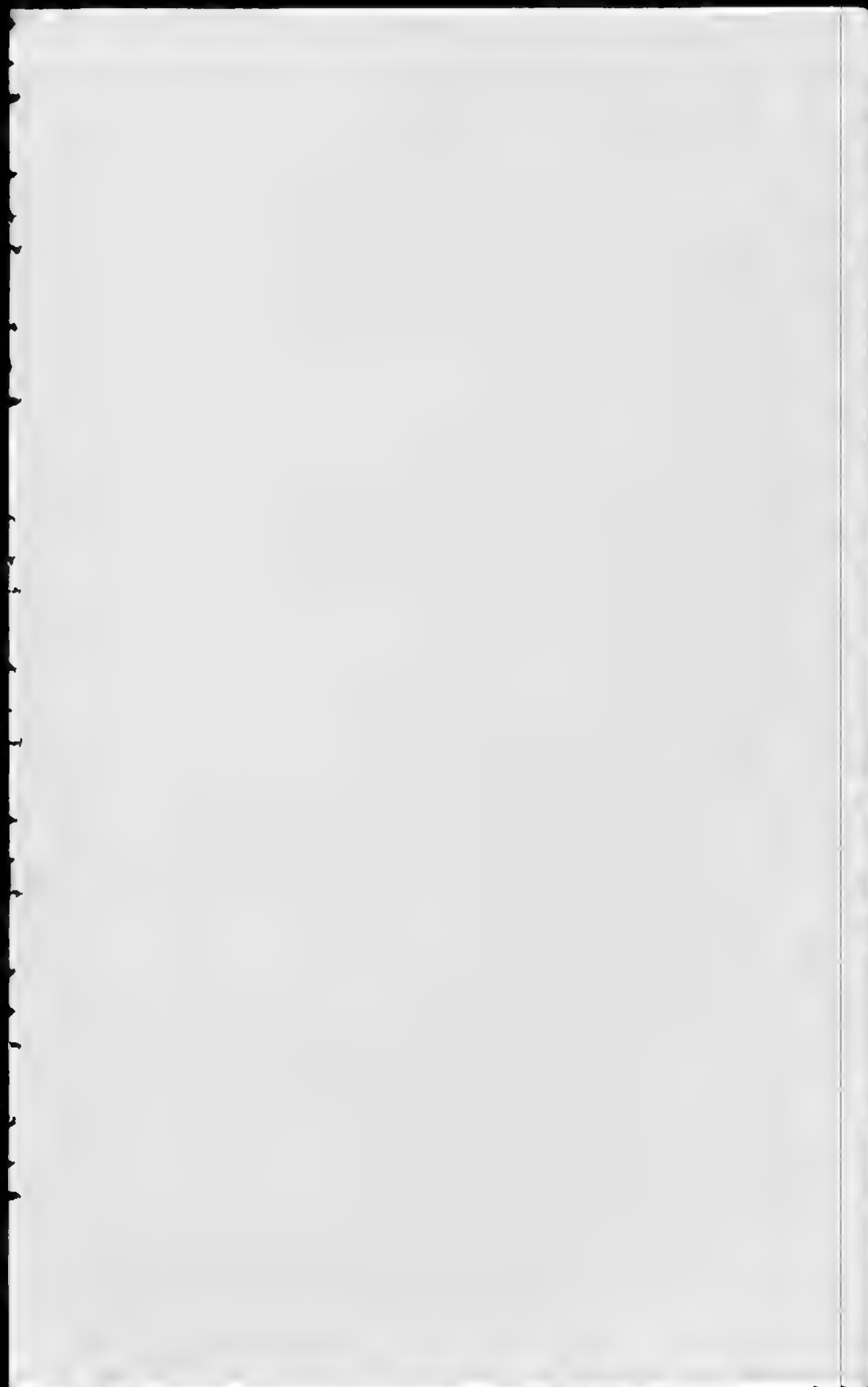
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**BRIEF FOR APPELLEE**

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IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21147

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UNITED STATES OF AMERICA, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE  
INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORA-  
TION, AMERICAN BROADCASTING COMPANIES, INC., AND  
ABC TELEVISION AFFILIATES ASSOCIATION, INTER-  
VENORS

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On Appeal from Decisions of  
the Federal Communications Commission

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United States Court of Appeals  
for the District of Columbia Circuit

FILED OCT 9 1967

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## STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Whether the record supports the Commission's finding that the merger will benefit the public interest by strengthening ABC's competitive position.

2. Whether the record supports the finding that the merger will benefit the development of UHF broadcasting.

3. Whether the Commission properly concluded that the merger will not prevent otherwise significant and likely independent activity by ITT in national television networking, CATV and pay-TV, or communications technology.

4. Whether the Commission properly concluded that the merger would have only a slight impact upon ABC's independent voice in regulatory proceedings, and no adverse impact upon the advertising market or ABC's news and public affairs programming.

5. Whether the Commission properly decided that no substantial question was raised as to the candor of the applicants' principals.

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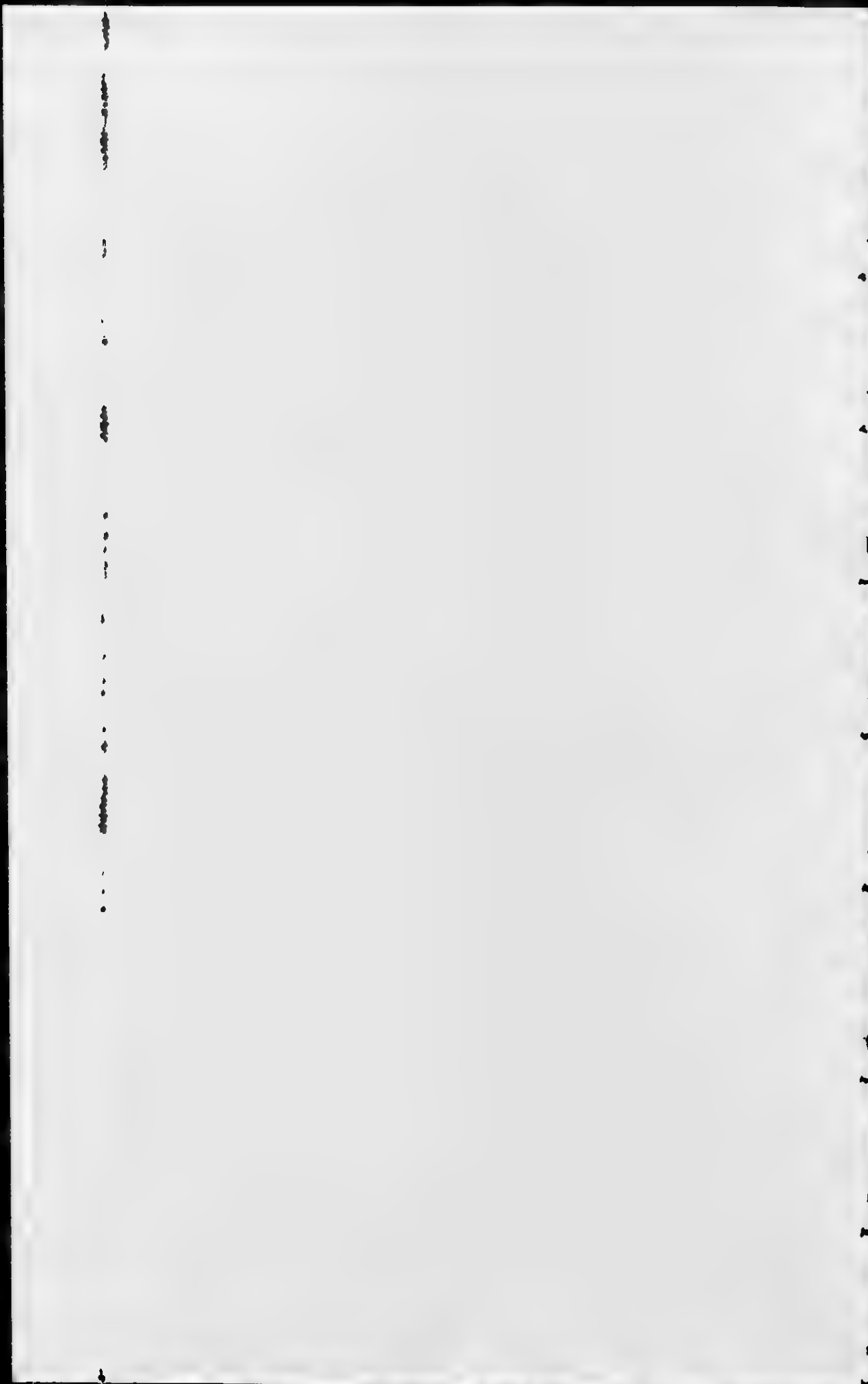
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IN THE  
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UNITED STATES OF AMERICA, APPELLANT

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VENORS

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On Appeal from Decisions of  
the Federal Communications Commission

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BRIEF FOR APPELLEE

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COUNTERSTATEMENT OF THE CASE

Appellant's statement of the facts is somewhat selective and argumentative. While we believe that the facts of record upon which the Commission decided the case can be discussed most efficiently in the argument portion of the brief, we also believe that a brief statement of the proceeding before the Commission will be of assistance to the Court.

This is an appeal filed on July 20, 1967 in reliance upon Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(b), from a Memorandum Opinion and Order of the Federal Communications Commission adopted and released on December 21, 1966 (R.-87)<sup>1</sup> and an Opinion and Order on Petition for Reconsideration adopted and released on June 22, 1967 (R. 5290-5471). The Commission's decisions granted applications for the assignment by American Broadcasting Companies, Inc. (ABC) to a new wholly owned subsidiary of International Telephone and Telegraph Corporation (ITT) of the radio and television licenses of ABC.

On March 31, 1966, ITT and ABC filed applications for Commission approval, under Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b),<sup>2</sup> of the assignment by ABC of the licenses for its seventeen radio and television broadcast stations<sup>3</sup> to

<sup>1</sup> The form of record references in this brief will follow that of appellant's brief: primary references will be to "R. —," transcript references will be to "Tr. —," with certain documents filed prior to April 21, 1967 being designated as units because their individual pages were not numbered. These latter citations are hyphenated: "R.- —." Individual page numbers of the original document are added where appropriate.

<sup>2</sup> Section 310(b) provides:

"No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

<sup>3</sup> ABC has television stations in New York, Chicago, Detroit, Los Angeles and San Francisco. It has AM and FM stations in the same cities, and in Pittsburgh.

a new wholly owned subsidiary with the same name to be formed by ITT (R.-1). The Plan And Agreement Of Merger between ITT and ABC dated February 14, 1966 (R. 5927-5962), pursuant to which the applications were filed, provides that each share of ABC common stock is to be converted into 0.5719 of a share of ITT common stock and 0.5719 of a share of a new class of ITT convertible preferred stock which has voting rights. The directors and officers of ABC are to be the directors and officers of the new ABC, except that two ITT directors will become directors of an enlarged ABC Board of sixteen members and will also become members of the Executive Committee of ABC. In addition, ITT is to recommend to its stockholders the addition to its present sixteen-man Board of four ABC directors, two of whom will also be added to the Executive Committee of ITT.<sup>4</sup>

On July 20, 1966, the Commission requested further information from the applicants relating particularly to the improvement of ABC's service from the financial resources of ITT and to ITT's plans to maintain ABC operations in a substantially autonomous manner (R.-22).<sup>5</sup> ABC and ITT responded on July 25, 1966 (R.-23, R.-24). On August 18, 1966, the Commission released an Order and Notice of Oral Hearing Before the Commission En Banc (31 F.R. 11190, R.-25), in which, one Commissioner dissenting and two concurring, it scheduled an oral hearing before the Commission *en banc*. The Commission accepted as the basis of this hearing the voluminous filings then before it, which it found raised no substantial questions of fact requiring an evidentiary hearing. However, it particularly invited the submission of any further statement of fact any interested person might wish to submit. Further material was submitted by ABC, con-

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<sup>4</sup> These arrangements are to continue for at least three years unless there is a material deterioration in the business or financial position of ABC.

<sup>5</sup> Two Commissioners dissented from the failure to designate the matter for hearing at that time.

cerning primarily television network competition (R.-30), and by ITT, principally related to the products and services of ITT and their relationship to ABC's activities as a purchaser (R.-31, R.-32, R.-35). No other parties submitted statements.

The *en banc* oral hearing was conducted on September 19 and 20, 1966 (Tr. 1-607). Eight representatives of ITT and ABC appeared, including the Presidents of both corporations and Raymond Saulnier, an economist, in addition to representatives of the Commission's Broadcast Bureau and Common Carrier Bureau, who had been directed in the order scheduling the hearing to raise all pertinent questions of law and policy.<sup>6</sup> The Department of Justice, which had had the merger under investigation since December 1965 (R.-60, p. 4), and had secured considerable material through formal Civil Investigatory Demands (e.g., R.-86), did not appear,<sup>7</sup> nor did any other

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<sup>6</sup> Hubbard Broadcasting, Inc., an applicant for the frequency now occupied by ABC's AM station in New York, also appeared. The Commission has decided that approval of the merger does not affect Hubbard's rights, and that question is not presented on this appeal.

<sup>7</sup> It may be noted in this connection that the Commission and the Department conducted the following correspondence concerning the merger, prior to and after the September, 1966 hearing. On June 8, 1966 the Chairman of the Commission had written to the Assistant Attorney General, Antitrust Division, asking to be kept informed of the Division's studies and conclusions. This letter was followed by one of June 30, 1966, saying that Commission consideration of the merger was imminent. On July 27, 1966, the Commission was advised that the Division's views would not be available for some time, in view of the complexity and importance of the issues. The Commission also transmitted to the Department of Justice a copy of the Notice of Oral Hearing, setting forth the procedure by which interested parties might appear. On October 25, 1966, the Commission again expressed its interest in the Division's views, stating that it expected to reach a decision soon. On November 3, 1966, the Commission was again advised that the Division's intense study was not complete, but that substantial questions were present. On December 20, 1966, the Antitrust Division, in a 5 page letter, summarized certain competitive problems which it believed warranted "serious consideration" by the Commission under the public interest standard of the Communica-



parties. Following the hearing, three Commissioners requested further information from ITT concerning its foreign operations (R.-54, R.-56) and ITT submitted extensive data in response on November 17, 1966 (ff R.-54) and December 9, 1966 (ff R.-56).

On December 21, 1966, three Commissioners dissenting, the Commission released a Memorandum Opinion and Order approving the applications (R.-87).

On January 18, 1967, the Antitrust Division filed petitions for reconsideration and intervention (R.-60) and for a stay (R.-61). ITT and ABC filed an opposition (R.-62), to which a reply was filed (R.-64). On February 1, 1967, in an Order on Petition for Reconsideration, the Commission granted the Department of Justice leave to intervene, stayed its December 21, 1966 decision, and directed the Department to specify its proposed issues, and to identify its proposed exhibits, witnesses and testimony (R.-68).<sup>8</sup> The applicants were required to file responsive material, to be followed by any rebuttal material. The requested material and certain additional material was submitted. (R.-72, R.-73, R.-80, R.-81, R.-83, R.-84, R.-85, R.-86.)

On March 16, 1967, the Commission issued a Further Order on Petition for Reconsideration (three Commissioners abstaining with a joint statement), in which it reopened the record "on broad issues to insure a full record," as follows (R. 90):

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tions Act, but which were "sufficiently speculative" that a suit under the antitrust laws was not presently contemplated. (Attachment to dissent of Commissioner Johnson to December 21, 1966 decision.) While the letter also indicated areas in which appellant believed that the Commission had no information before it, no underlying data was submitted.

<sup>8</sup> The Commission could not find good reason for the lateness in seeking intervention, but granted intervention because it was "keenly aware of the importance of the present proceeding" (R.-68, p. 3). and because it was "anxious even at this late date to know and consider what evidence the Department has relating to this matter." (R.-68, p. 4.)

Two Commissioners dissented, and three concurred with separate statements.

- (1) To determine the benefits to the public interest from the proposed merger;
- (2) To determine the detriments to the public interest from the proposed merger; and
- (3) To determine, in light of the evidence adduced on the above issues and the entire record, whether the public interest will be served by a grant of the applications.

The existing record was to be incorporated and the Broadcast Bureau was to participate "to insure that the record, as supplemented, is complete" (R.-90, pp. 2-3). The Commission also found (R.-90, p. 3) that due and timely execution of its functions imperatively and unavoidably required that the Examiner certify the record to the Commission for decision.<sup>9</sup> The Commission also further stayed the grants pending its further order.

The record of the hearing, involving 34 witnesses, some 3000 pages of transcript, 500 exhibits, and voluminous proposed findings and briefs (see Vol. 45), was certified to the Commission on April 27, 1967 (R. 4489). Oral argument was held on June 1 and 2, 1967 (Tr. 3883-4327).

On June 22, 1967 the Commission issued its Opinion and Order on Petition for Reconsideration (R. 5290-5471), in which, three Commissioners dissenting, it affirmed its previous grant of the applications.<sup>10</sup> The Commission found (R. 5329) "that the proposed merger will in our view strengthen ABC technologically, increase competition in the American broadcasting equipment and technology field, and assist UHF development." The Commission's opinion concludes that the merger (1) will

<sup>9</sup> A petition for intervention by the American Civil Liberties Union, whose only proposed witness was then expected to be offered by the Department of Justice, was denied, but the ACLU was invited to submit a statement as *amicus curiae* within ten days of the close of the record, including a showing of the usefulness of such participation. Participation by Mr. Gerald Gottlieb as *amicus* was denied.

<sup>10</sup> The Commission accepted and considered the *amicus* statement tendered by the ACLU (R. 5322).

strengthen ABC in competition with the other, larger networks, and in both its entertainment and its news and public affairs programming; (2) will strengthen ABC technologically; and (3) will contribute to the development of UHF broadcasting, with the concomitant benefit of permitting ABC to have primary UHF affiliations in places where it now must rely upon secondary clearances on VHF stations primarily affiliated with the other television networks (Par. 84, R. 5329). The Commission did not agree, as urged by the Department of Justice, that ITT was such a likely independent factor in network television that the merger would have any anticompetitive effects in that area, or that there would be any substantial anticompetitive effects in the community antenna television (CATV) field (Par. 84, R. 5328); it also found that any detriment to ABC's independence in regulatory activities would be slight and that there would be no detriment to its independence in broadcast activities (R. 5328-5329).

These conclusions followed detailed discussions of the record and opposing arguments in each of these areas. The Commission first determined that general antitrust criteria were properly to be looked at in considering competitive consequences (Par. 7-13, R. 5293-5297), reviewed the facts on ITT's previous interest in entering broadcasting in terms of the relevant criteria (Par. 14-17, R. 5298-5299), and concluded that ITT was not a likely entrant into networking absent the present merger (Par. 18, R. 5299-5300). The same sort of analysis was made, and the same conclusion reached, with respect to the argument that, absent the merger, ITT might have become a significant factor in the CATV field (Par. 19-28, R. 5300-5303).

On the question of domestic technological activity by ITT, the Commission found that the merger would induce ITT to make a contribution through ABC, the only network without its own research, development and manufacturing facilities; it found no basis for a conclusion

that there was some significant contribution to new development which ITT might have been expected to make absent the merger and which was now foreclosed (Par. 29-38, R. 5303-5307). The Commission noted that ITT had not previously engaged in the manufacture or sale domestically of broadcast equipment (Par. 34, R. 5305), and found (Par. 35-38, R. 5305-5307) that ITT would now have an incentive to do development work in UHF to enable ABC to have television affiliates of equal status with those of the other two networks. The Commission stated (R. 5305):

35. The testimony of ITT officials, the exhibits, and the actions taken by ITT since the merger agreement are persuasive that merger with ABC will provide ITT with an economic incentive to engage in research and development of technology and manufacture of some equipment that will be of use to ABC and will help to keep ABC in the forefront of technological development in the field. For example, the immediate problem of ABC with respect to audience coverage arises in substantial part from the fact that there are a number of markets (18 out of the top 100, plus many more in the smaller markets), in which there are only two VHF stations. As the older and stronger networks, NBC and CBS have a substantial advantage over ABC both in station affiliations and in clearance of programs in markets with two dominant stations. The spectrum allocation is such that it is not possible to assign additional VHF channels to these markets. However, a large number of UHF channels are available and it is anticipated that ultimately there will be three or more television stations—including both VHF and UHF—in all major markets. But with present technology and equipment the VHF stations generally have a wider range of reception, are more easily tuned on a home receiver, are more economical to operate, and have other operating advantages. Therefore, the hope of providing three full television network services to all major television markets depends upon the develop-

ment of UHF technology so that UHF transmission and reception is equal to VHF in all significant respects.

36. This fact has been recognized by both ABC and ITT and both have pledged efforts to improve and develop UHF technology and to utilize UHF station outlets for ABC where that is practical. These statements are not mere pious declarations of good intentions but represent some very specific promises and proposals, which obviously serve the economic interests of the parties.

The Commission further stated (R. 5307):

We further stress that representations by ITT of technological development in the UHF field are regarded as binding, for the critical period ahead, and we have conditioned our action today to assure their effectuation.

The Commission also reviewed in detail the contentions that ABC would lose its independence in regulatory proceedings and commercial transactions (Par. 39-47, R. 5307-5311), and that competition in television advertising would be adversely affected (Par. 48-57, R. 5311-5315), finding no substantial adverse effects.<sup>11</sup>

The Commission reviewed ABC's present competitive disadvantages as a television network, including the growing disparities in revenue and profits between ABC and the other two television networks, ABC's continuing lack

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<sup>11</sup> Rather, the Commission stated (R. 5311): "It is clearly to the interest of both companies to have a strong, efficient, economically operated and technologically advanced television network. Neither company can afford to permit ABC to lag behind in utilizing whatever advance technology may be developed. Indeed, one of the most important aspects of the proposed merger is that it will permit ABC to cope with advancing technology and maintain a competitive position which it might be unable to do otherwise. The assurance of financial strength and stability and the availability of strong and extensive research and technological capabilities are likely to strengthen the independence of ABC in commercial situations, as compared with its present position of dependence upon its competitors for technology and equipment."

of competitive affiliates, and ABC's inferior studios, production facilities and technical equipment. (Par. 58-67, R. 5315-5319.) It found (Par. 68-72, R. 5320-5322) that ITT's much greater financial resources would confer substantial benefits in this area, in addition to the technological support previously discussed. Thus, the Commission noted the increasing expense of public service and news programming, and the importance to the public interest of having adequate financial backing for these efforts, stating (R. 5317):

\* \* \* It is clearly in the public interest to insure that the ABC television network is permitted to operate in circumstances that will best allow it to fulfill its public service obligations by the presentation of news and public affairs programs and other quality television programming.

It concluded (R. 5320) that its decision should not turn on the question of whether ABC could secure needed funds in some other manner. What mattered was that ITT's financial strength would be of specific advantage in permitting ABC to plan ahead to attempt programming innovations with their attendant risks, to chance more or sooner primary UHF affiliations, and to compete in an environment of financial stability vis-a-vis the stronger networks. In recognition of the competitive value of stability flowing from strong financing, it stated (R. 5320):

\* \* \* In short, we think it desirable to promote the best possible environment for ABC operation, both to serve the public interest and to compete with CBS and NBC. Merger with ITT, a large diversified company with strong financial resources, does promote that environment, by making available the funds with which to take the risks and make the judgments necessary for the forward progress of ABC's news, public affairs, entertainment and other similar programming or related endeavors. \* \* \* <sup>12</sup>

<sup>12</sup> The Commission also stated (R. 5321): "With the resources and backing of ITT, ABC will in a certain number of markets be

Finally, the Commission gave detailed attention to the possibility that the integrity of ABC news might be impaired (Par. 73-81, R. 5322-5326), concluding, upon the basis of the commitments of the parties, the organizational arrangements, and the traditional independence of ABC news, that there was no reasonable doubt on this score.<sup>13</sup> It stated (R. 5326):

Considering these assurances and the authority which the Commission has with respect to its licensees, the organizational arrangements between ITT and ABC, discussed above, by which ABC has a number of directors who are independent of ITT, the independence of the ABC News organization within ABC, the tradition and ethics of journalistic independence and integrity, the competitive necessity of maintaining public confidence in the integrity of broadcast news sources, the check upon news integrity which other competitive news sources provide, and all the other factors mentioned above, we find that there cannot be any reasonable doubt that the integrity and independence of ABC's activities in the news, information and public affairs field will be maintained after the merger.

On balance the Commission concluded (R. 5329-5330):

\* \* \* the detriments revealed on this record (e.g., the possibility of an independent network entry by ITT or of the establishment of a CATV national grid) simply are too speculative or slight to weigh heavily in the balance. On the benefits side, we also recognize that the matter does not suddenly become one of sure, definitive nature. There is necessarily

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able to forego reliance upon secondary clearances on VHF stations in favor of primary affiliations with UHF stations (T. 4131, 4176). We take this representation as a commitment that must be carried out; we will require reports at year intervals for at least three years following the merger as to ABC's actions to carry out this commitment."

<sup>13</sup> The Commission also rejected contentions that the applicants had shown a lack of candor (R. 5327).



some degree of uncertainty in, for example, how much ITT may contribute to the domestic broadcast technology market. We have endeavored to make that contribution (and the assistance of UHF through primary affiliations) more concrete by the conditions imposed herein. But in the final analysis we are left with the difficult task of judgment as to the future on the benefits side also. We have discharged that task with the background of this agency's long history of attempting to improve ABC's competitive posture vis-a-vis the other two networks and its ability to better serve the public interest in areas such as news, public affairs, and cultural entertainment innovation. It is our firm judgment that this merger, by providing ABC with a stronger financial base, will significantly assist ABC in making the necessary long-range plans and in taking the risks in this area so vitally important to the American public. It will be of benefit to the development of UHF during its most critical period. In sum, then, the benefits to the public interest flowing from the proposed merger clearly outweigh any detriments to the public interest that may be potential consequences, including those that have been so exhaustively explored in the record of the present proceeding and that are discussed in the foregoing opinion.

## SUMMARY OF ARGUMENT

### I.

The Commission correctly found that ABC is in a competitively weaker position than the other national television networks and that the increased financial resources of ITT will enable it to maintain stability of operations and to take the risks necessary to expand its public service. These findings were supported by substantial evidence of record. It was not necessary for the Commission to find specific deficiencies in ABC's present performance due to a lack of funds or that it cannot acquire adequate financing from any other source. The benefits of competition

do not lend themselves to detailed forecast, but may be reasonably anticipated by the Commission upon the basis of its expert judgment.

## II.

The Commission also expressly found that the merger would benefit the public through contributions by ITT to UHF technology, and by an increase in primary affiliations by ABC with UHF stations in place of secondary affiliations with VHF stations. ABC and ITT will have an incentive to develop UHF in order to make ABC fully competitive. ITT has specific plans to develop UHF technology, and ABC has committed itself to increase its UHF affiliations. The Commission has made the fulfillment of this commitment a condition of its approval of the merger, and this condition is a meaningful supplement to ABC's public interest responsibilities.

## III.

The Commission correctly concluded that there was no substantial detriment to the public interest from the merger in terms of eliminating potential activities of ITT which it otherwise would have engaged in. First, it is clear that ITT was not a likely independent entrant into national television networking. It lacks any special capacity in this area, and was not shown by objective factors of market structure to have been at the edge of the network market.

The Commission also properly found that the merger did not cause ITT to cancel plans for extensive CATV or pay-TV activities. While ITT had engaged in some CATV activity, it had independently decided that this was not a field in which it wished to make a substantial entry. The Commission's findings on this issue are supported by contemporaneous documents as well as by the testimony of the parties. In view of the unsettled future of CATV, the Commission found only a slight detriment to the public interest in the possibility that ITT might

some day have changed its policy in this area if it were not merging with ABC. This was a reasonable judgment in light of the current problems facing CATV.

Finally, it was reasonably found by the Commission that the merger was not likely to have any substantial adverse impact on the development of new channels of communication, particularly satellite technology. The essentials of this new technology have already been developed, and several leading companies are engaged in research and the manufacture of equipment. ITT's policy is to move ahead with research as fast as it can, and it will be to its economic advantage to remain in the forefront of this field. The Commission concluded that advances in satellite technology would not be impaired by the merger.

#### IV.

The Commission also determined upon the basis of the entire record that the merger will not have a substantial adverse effect upon ABC's operations in the three areas concerning which question was raised: ABC's independence in regulatory proceedings, reciprocal dealing in the advertising market, and the integrity of ABC's news and public affairs programming. The record supported the Commission's finding that the proposed status of ABC gave assurance that it would continue to operate with a substantial degree of independence. The Commission, however, further examined each area of potential conflict between ABC's interests and those of other ITT units, to determine the effect of any possible loss of independence.

The Commission correctly determined, first, that there would be a slight detriment if ABC did not take fully independent positions with respect to international common carrier matters. It also correctly determined that ABC did not have substantial conflicting interests with ITT's common carrier operations in the domestic area. Appellant has made no showing that the range of conflict is greater than that found by the Commission.

Appellant's claim that the merger will lead to substantial reciprocal dealing in the advertising field is not supported by the record. The importance of ITT to those purchasers who buy substantial television time has not been shown. In the absence of a showing of such leverage, or of past conduct of this sort by the parties, there is only a mere possibility of reciprocal dealing and not a substantial probability.

The record is also clear that the integrity of ABC news and public affairs programs will not be affected. While ITT has extensive foreign business interests, the Commission's experience is that the outside business interests of other licensees have not affected the integrity of their news operations. There is no reason to think the result will be different here, since ITT fully understands the need for absolute integrity in this area, and has provided a structure for ABC to insure such integrity. The present independent operation of ABC news by professional news personnel will continue after the merger.

## V.

The Commission reasonably determined that appellant's claims of a lack of candor in statements made by the parties during the proceeding were not well founded. Appellant is insisting upon a precision of wording which goes beyond the requirements of candor, and it is clear from the record that the statements complained of were made in good faith. The Commission's finding in this regard should not be lightly disturbed, and appellant has provided no basis for overturning it.

## ARGUMENT

### INTRODUCTION

The decision below followed an exhaustive adjudicatory hearing in one of the fields in which "[t]he growing complexity of our economy induced the Congress to place regulation of businesses like communication in specialized

agencies with broad powers." *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203. This being so, "the administrative tribunal under statutes such as this, is the final arbiter of the public interest," *Johnston Broadcasting Co. v. F.C.C.*, 85 U.S. App. D.C. 40, 46, 175 F.2d 351, 357 (1949), and the function of the reviewing court "is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law." *United States v. Pierce Auto Lines*, 327 U.S. 515, 536; *National Broadcasting Co. v. United States*, 319 U.S. 190, 224; *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 145-146.

This is not to urge that judicial review is a formality, for the agency's judgment must be "within the bounds of rational derivation from the findings," *Johnston Broadcasting Co.*, *supra*, 85 U.S. App. D.C. at 46, 175 F.2d at 357. And the findings in turn must rest upon substantial evidence in the record as a whole, i.e., "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 229. "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence," *Consolo v. F.M.C.*, 383 U.S. 607, 620.

We stress these fundamental standards of judicial review because appellant's lengthy brief is largely devoted to an attempted demonstration that its evidence is "correct" and that the Commission's judgment was faulty.

In essence, it seeks to reargue its case *de novo* upon its own view of the public interest, failing to appreciate that the Commission's view of the public interest is determinative if within the bounds of reasoned judgment. Its burden of demonstrating an absence of reasoned judgment has consequently been neglected and clearly not met.

**I. The Commission Correctly Determined That ABC Is Competitively Weaker Than the Other Two Television Networks and That ITT's Added Financial Strength Will Significantly Aid ABC in Serving the Public Interest.**

The Commission found that ABC has historically been in a competitively weaker position than the CBS and NBC television networks, and that ITT's greater financial strength will significantly aid it in becoming a stronger competitor and better serving the public through expanded news and public affairs services and entertainment innovations (R. 5329). Appellant urges (Point I, pp. 25-39) that the determination is erroneous because the Commission failed to make two essential findings: (1) that there are specific deficiencies in ABC's performance attributable to a lack of funds, and (2) that the funds are not available from other sources. It supports these contentions by attempting to demonstrate that such findings could not be made upon the present record because there is no evidence of such deficiencies (Br. 27-34), and because the record shows that ABC could obtain all needed funds without the merger (Br. 34-37). Finally, it attempts to explain its position that such findings were essential (Br. 37-39). We believe that appellant's Point I constitutes little more than an insistence that the Commission make two irrelevant findings which the Commission properly deemed unnecessary to its decision.

Appellant contends (Br. 38) that the Commission, because of the presence of alleged detriments from the merger, should have demanded "a high standard of proof of specific benefits to justify such a merger." And, as

mentioned above, it translates this standard into particular requirements that the Commission find specific deficiencies in ABC's present operation which will be remedied, and that these specific benefits could be achieved in no other way. We agree, of course, that significant detriments must be fairly weighed against the benefits to be expected from enhanced competition. We do not agree that the presence of alleged, or actual, detriments from the merger affects the established standards governing the Commission's exercise of its judgment concerning expected benefits, and we think it clear that appellant's requirements are no part of those standards. The benefits to be derived from enhanced competition need not be specifically determinable in advance in order to be given weight.

The field of broadcasting is one of free competition. *F.C.C. v. Sanders Brothers Radio Station*, 309 U.S. 470, 474. But even in the common carrier field, with its "pervasive regulatory scheme" modifying free rate competition, *United States v. R.C.A.*, 358 U.S. 334, a field in which the Commission may not grant duplicate international circuits in reliance upon an assumed national policy favoring competition, the requirement for a valid decision is only that the Commission "warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it," for "it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect." *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 97.

The Supreme Court in *F.C.C. v. RCA Communications, Inc.*, 346 U.S. at 96, specifically rejected the position taken by the appellant:

In reaching a conclusion that duplicating authorizations are in the public interest wherever competition is reasonably feasible, the Commission is not required to make specific findings of tangible benefit. It is not required to grant authorizations only if



there is a demonstration of facts indicating immediate benefit to the public. To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles "by specialization, by insight gained through experience, and by more flexible procedure." *Far East Conf. v. United States*, 342 U.S. 570, 575. In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast \* \* \*

When the Commission reaffirmed its grant upon the remand in that case, basing its decision upon its own judgment of likely benefits from new competition, but without finding specific deficiencies in existing service, this Court affirmed, *RCA Communications, Inc. v. F.C.C.*, 99 U.S. App. D.C. 163, 238 F.2d 24 (1956), *cert. den.* 352 U.S. 1004, because the Commission relied "upon its own judgment in the matter, educated by experience, and supported by consonant findings." (99 U.S. App. D.C. at 165, 238 F.2d at 26).

The issue then is whether the Commission, exercising an informed discretion upon proper findings, can warrant that enhanced competition would serve some beneficial purpose in the area of national television networks. We think there is no doubt on this score.

First of all, the importance of strong network competition is manifest. High costs do not permit individual stations to maintain full national or international news staffs, nor to produce needed documentaries and other public service programming. Networks are obviously essential to these functions, as well as for the production and distribution of popular entertainment programs. In its 1963 decision prohibiting the optioning by networks of blocks of time on affiliated stations, the Commission described the benefits of networking as including, "the provision of a popular, high-quality, well-rounded program service (including not only entertainment but news and

public affairs programming, and other public service features) which can be provided by no other form of organization, and which has brought television to its high level as a medium of communication and paramount importance as an advertising medium." (*Second Report and Order*, Docket No. 12859, 34 F.C.C. 1103, 1117, 28 F.R. 5501, 5507). And this Court has considered equality of network competition so significant that it has directed equality of network-owned radio stations in New York City, without regard to proof of specific adverse competitive consequences flowing from unequal facilities. *American Broadcasting-Paramount Theatres, Inc. v. F.C.C.*, 120 U.S. App. D.C. 264, 345 F.2d 954 (1965), *cert. den.* 383 U.S. 906.

The Commission concluded here that the ABC network, facing increasing costs, and at a competitive disadvantage with the other two networks, would be significantly aided in performing its vital role in our system of broadcasting by the greater financial strength of ITT. Its approach to the question clearly met the test of *F.C.C. v. RCA Communications, Inc.*, *supra*. While appellant states (Br. 27) that, "[t]he Commission does not attempt any analysis of ABC's competitive situation \* \* \*," a careful and relevant analysis was in fact made.

The Commission found, *inter alia*, that between 1961 and 1966 the revenue gap between ABC and the average of the other two television networks (whose individual figures were not disclosed) increased from \$21.8 million to \$80.7 million (R. 5316).<sup>14</sup> It found also that while the ABC television network had a pre-tax profit of \$4.7 million in 1961, it has lost money each year since 1963, with a \$9 million dollar loss in 1966, while the CBS-NBC

<sup>14</sup> Appellant claims (Br. 27) that revenue figures are entirely misleading, because ABC's market share did not vary appreciably, and it is the great growth of television revenues overall that produces the increasing disparity in dollar values. But ABC's relative position has deteriorated, from 28.4% in 1960, and 30.6% in 1961, to 27.3% in 1966 (R. 4319), and absolute revenues are important in a field of greatly increased costs from year to year.

average pre-tax profit went from \$10 million in 1961 to \$43.9 million in 1966 (R. 5316). The ABC radio network was found to have lost over \$20 million in the last six years, a sum about \$9 million greater than the profit of the ABC owned radio stations (R. 5316). While the owned television stations have been profitable, the net profit accruing when network losses are deducted has actually declined slightly from 1960 (a high year) when it was \$20.5 to 1966 when it was \$20.4 million, in a period of sharply rising costs, and one in which the profits of the other two networks have more than doubled (R. 5316). The entire ABC broadcast operation profit has been put back into the operation (R. 5316). The evidentiary support for these findings is undisputed.

The Commission further noted (R. 5318) that the past inequality of competitive conditions has not substantially changed. This finding has ample support. The ABC television network has 137 primary affiliates, reaching 93.4% of the television homes, while CBS has about 192 reaching 99.2%, and NBC has about 206 reaching 99.0%. (Tr. 70.) While ABC achieves near parity of program clearances in prime evening time, with an average lineup of 176 stations, or roughly 96.8% of television homes (Tr. 3381), it is clearly not competitive in daytime audience (R. 840-844, Tr. 3046-3047), and there are disadvantages in evening programming in having to attempt to secure clearances on stations with which ABC has only secondary affiliations.<sup>15</sup> Furthermore, there are approximately eighteen communities in the top 100 television markets with only two television stations, and in these two-station markets ABC has fewer primary affiliates than CBS or NBC (R. 5305), leading to the problem mentioned above of having to obtain program clearances

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<sup>15</sup> Thus, there is a lack of promotion for programming, and clearances are often on a delayed basis with consequent disadvantages in terms of less potential audience, inappropriate time period for the type of program, incompatibility with preceding programs, and additional costs for film prints (Tr. 3386-3388, 3394-3396).

on stations primarily affiliated with another network. Appellant's counsel conceded to the Commission that this is "somewhat of a disadvantage," although he did not think it significant (Tr. 4055-4056).

While the ABC television network is operating at a loss, and the profits from ABC's owned television stations have not increased sufficiently to provide a greater margin over network losses than in 1961, the costs of television network operation continue to increase substantially, requiring large investments long in advance of the opportunity to realize a return (R. 5317). And, while ABC lost \$18 million in the production and presentation of news and public affairs programs in 1966, its budget of \$30 million for television news in 1967 is expected to rise to \$40 million in 1968—if the money is available (R. 5317).

There was thus ample support for the ultimate finding (R. 5319) that "There can be no doubt that the competitive position of ABC today is worse, in some respects, than it has been in the past."<sup>16</sup>

There can be little doubt in this setting that merger with ITT will, as the Commission found, strengthen ABC competitively and better enable it to take the risks necessary to expand its public affairs and news programming, to bear future capital expenses, and to risk innovation and large advance payments for expensive entertainment films. Thus, ITT's resources will facilitate risk taking and stability in a field where the cost of enter-

<sup>16</sup> This is so, accepting appellant's view (Br. 28) that the network and its owned stations must be considered an economic unit. As we have shown above, ABC is falling sharply behind in profit on total television operations (network and owned stations combined) and total broadcast operations. The record also shows that from 1960-1965 ABC's total profits from the television and radio networks and all its owned stations went only from \$16 million to \$19.9 million, while the profits of all three networks on a similar basis went from \$93.2 million to \$163.4 million (R. 4321). Similarly, ABC's total profit figures on AM networking and owned AM and FM stations went from a loss of \$4.5 million in 1960 to the break even point in 1965, while the figures for all three networks went from a loss of \$2 million to a profit of \$1.9 million (R. 4320).

tainment programs has increased from \$123,963,000 in 1963 to \$170,369,000 in 1966 (R. 1148); where news, public affairs and special events have risen from \$3.5 million in 1961, when networking was profitable (Tr. 214-215), to a projected \$40 million in 1968 (R. 5317); where the substantially increased use of feature films (Tr. 2435-2436) has resulted in anticipated costs for them of \$40 million for 1967-1970 (R. 141; Tr. 2431-2434), which threaten to exclude ABC from bidding on an equal basis (Tr. 1682-1683); where plans for complete color programming (Tr. 2489-2492) cost almost \$8.4 million in 1965 (Tr. 2208); where total costs for colorization of the network and ABC's owned television stations have been estimated at \$50 million (Tr. 2209-2210);<sup>17</sup> and where NBC and CBS have more modern, spacious facilities in New York and California, with consequent disadvantages to ABC program production<sup>18</sup> (as appellant concedes, Br. 32). Finally, as the Commission found, and appellant also apparently concedes (Br. 33-34), substantial capital expenditures are desirable.

As the Commission stated in summary of some of these elements (R. 5317):

Public service programming, particularly in the entertainment and news fields, is often the most expensive and the least profitable. "Stage 67," which was an ABC venture into cultural programming, represented an effort at improving the quality of television entertainment. "Stage 67" cost nearly \$10 million to produce and resulted in a net loss of \$4

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<sup>17</sup> NBC is now in full color (Tr. 2490); CBS went to color for its evening schedule and news in autumn, 1966, and announced that all regularly scheduled programs would be in color in 1967 (Tr. 2294); ABC's evening schedule went to color in the fall of 1966, and ABC news and most sports programs are now in color (Tr. 2290, 2490-2494.)

<sup>18</sup> See Tr. 2291-2300, 2311-2313; R. 974-975 (a report to ABC by an engineering firm in May, 1965); R. 432 (an ABC study). The record also contains descriptions of CBS's Television City in Hollywood (R. 449-536) and its Center in New York (R. 537-550).

million. News broadcasts and public affairs programs are loss items. In 1966 ABC lost \$18 million in the production and presentation of news and public affairs programs. Preemptions for such programs cost the company another \$1 million. The 1967 budget of ABC for television news is \$30 million, plus another \$3 million for radio news. It is estimated that in 1968 the budget for television news will go to \$40 million—if the money is available. It is clearly in the public interest to insure that the ABC television network is permitted to operate in circumstances that will best allow it to fulfill its public service obligations by the presentation of news and public affairs programs and other quality television programming.

The President of ABC, Leonard H. Goldenson, considered ABC's added capacity to make long-term commitments "essential to program improvement" (Tr. 100) and to stability of operations and freedom to plan and develop for the future (Tr. 101). The Commission agreed, finding that it need not decide whether the merger was the only source of financing, stating (R. 5320):

In any event, it is, we think, unnecessary and inappropriate that our determination of this issue turn solely on the above facet. For it is clear that ABC, which as the "third network" lags behind its two competitors, will be significantly aided by having ITT's financial strength back of it, in such matters as its attempts at cultural programming innovation, news and public affairs expansion, ability to chance more or sooner primary affiliation with UHF stations. Adverse developments in these areas or new technological developments could be a most serious matter to ABC, if it were to shoulder new substantial financial burdens in addition to its already high debt ratio. Such an atmosphere would not appear conducive to risk in the public interest areas we have described. And, as shown by "Stage 67", there are, and will always be, considerable risks in these im-

portant public areas.<sup>5</sup> In short, we think it desirable to promote the best possible environment for ABC operation, both to serve the public interest and to compete with CBS and NBC. Merger with ITT, a large diversified company with strong financial resources, does promote that environment, by making available the funds with which to take the risks and make the judgments necessary for the forward progress of ABC's news, public affairs, entertainment and other similar programming or related endeavors.

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<sup>5</sup> An illustration of both the significance of broadcast news reporting and of the burden it imposes upon the networks has occurred during the Commission consideration of this proceeding. The point is well summarized in a report by Jack Gould, the New York Times television critic, entitled "TV: Spotlight on Crisis," New York Times, June 8, 1967, p. 87. Mr. Gould says, inter alia: "All regular entertainment programs and commercial announcements were cancelled Tuesday night by the three national television networks to carry the debate in the United Nations Security Council on the war in the Middle East. The sustained coverage was a notable public service by the American Broadcasting Company, the Columbia Broadcasting System and the National Broadcasting Company. \* \* \* The total cost to the networks in the cancellation of an entire evening's schedule ran into the millions of dollars, though some of the revenue may later be recaptured. But the telecast constituted one of television's finest achievements. If a viewer was not aware of the dimensions of the Middle East situation at the end of the evening, it was his own fault, not television's."

The Commission's findings on this issue thus rest squarely on the record and comply with the standard set forth by the Supreme Court in *F.C.C. v. RCA Communications, Inc.*, *supra*.<sup>19</sup> It is therefore irrelevant that, as

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<sup>19</sup> The Commission has not relied upon a presumption favoring one factor over another, as was found to be the case in *I.C.C. v. J-T Transport Co.*, 368 U.S. 81, 89-90 (App. Br. 39), nor, as in *Braniff Airways, Inc. v. C.A.B.*, 113 U.S. App. D.C. 132, 306 F.2d 739 (1962) (App. Br. 26), are there mere conclusionary findings which, although relevant, were unsupported by basic findings. Appellant's complaint here does not seem to be that the findings made are not clear, or are not supported by substantial evidence, but rather that the Commission's basic approach to the problem was faulty.



appellant claims (Br. 30), a merger which violates Section 7 of the Clayton Act cannot be justified by pointing to the existence of a larger, more dominant firm, *United States v. Philadelphia National Bank*, 374 U.S. 321, 370-371; *United States v. Bethlehem Steel Corporation*, 168 F. Supp. 576, 618 (S.D.N.Y., 1958). For Section 7 of the Clayton Act contains a particular standard the breach of which is decisive, whatever other benefits may be present. A finding of some other competitive benefit is irrelevant once it is determined that there is a substantial lessening of competition in any market. Here, on the contrary, with no violation of the Clayton Act even alleged, it was the Commission's duty to weigh all relevant benefits and detriments under a pragmatic public interest standard.

In sum, appellant is insisting upon a specification of remedies for particular deficiencies in the face of judicial recognition that, "In the nature of things, the possible benefits of competition do not lend themselves to detailed forecast, \* \* \* " *F.C.C. v. RCA Communications, Inc.*, 346 U.S. at 96-97.

**II. The Commission Properly Found That ITT Would Provide Technological Support to ABC, Particularly in UHF Development, and That ABC Will Be Able to Increase Its Primary Affiliations With UHF Stations.**

The Commission found that the merger would benefit the public interest through contributions to UHF technology by ITT (R. 5305-5307) and increased affiliation by ABC with UHF stations (R. 5321). It accepted representations of these activities as binding commitments, upon which the grant was conditioned, requiring annual reports from ABC on its UHF affiliations for at least three years (R. 5307, 5321). Appellant (Point II, pp. 39-48) does not contest the importance of the development of UHF broadcasting to a fully competitive nationwide television service. Its argument is that the record shows that no contribution will be made by ITT and that

Commission acceptance of commitments as conditions of the grant is immaterial. The issue is one of substantial evidence. The record provides ample support for the findings.

It has been a cardinal principle of the Commission's plan of assignment of television channels throughout the United States that there must be full utilization of the UHF portion of the spectrum, along with the twelve VHF channels available, if a fully competitive nationwide television service is to be achieved. See the 1952 *Sixth Report and Order on Television Allocations*, Docket Nos. 8736, *et al.*, 17 F.R. 3905, at 3912, 3927, Vol. 1, Part 3, Pike & Fischer, Radio Regulation 91:599, at 91:621, 91:664. Despite severe difficulties whose full impact was not foreseen at the time of the original allocation of UHF and VHF channels on an intermixed basis, see, e.g., *Coastal Bend Television Co. v. F.C.C.*, 98 U.S. App. D.C. 251, 234 F.2d 686 (1956), the basic principle has been adhered to and, in 1962, Congress adopted legislation authorizing the Commission to make rules to require all receivers shipped in interstate commerce to be capable of receiving UHF signals. 47 U.S.C. § 303(s).<sup>20</sup>

In recommending adoption of the new legislation, the House Committee on Interstate and Foreign Commerce noted that, "The significance of the market figures is this: Our present system is limited by the allocation structure to no more than three national networks—no matter how many entrepreneurs may be willing to enter the commercial field or how much demand or need there may be for additional network service. Indeed, one of the present three networks is under some handicap because of the second figure (70 markets are limited to two stations) and, therefore, that network is unable to secure

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<sup>20</sup> It was the view of Congress that development of UHF "is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States." H. Rept. No. 1559, 87th Cong., 2d Sess., p. 4; S. Rept. No. 1526, 87th Cong., 2d Sess., p. 7.

primary affiliates in these markets." (H. Rept. No. 1559, 87th Cong., 2d Sess., p. 3.)

The failure of UHF to become fully competitive is particularly significant here because, as the Commission noted (R. 5317-5319), it is the lack of comparable affiliates resulting from failure to make UHF fully competitive which has in large part prevented ABC from being fully competitive.<sup>21</sup> As the Commission stated (R. 5305):

For example, the immediate problem of ABC with respect to audience coverage arises in substantial part from the fact that there are a number of markets (18 out of the top 100, plus many more in the smaller markets) in which there are only two VHF stations. As the older and stronger networks, NBC and CBS have a substantial advantage over ABC both in station affiliations and in clearance of programs in markets with two dominant stations. The spectrum allocation is such that it is not possible to assign additional VHF channels to these markets.

In 1963, although, because of its commitment to UHF development, the Commission decided against "dropping in" VHF channels at short spacing in seven communities which had only two VHF channels, it stated that, "the absence of a third comparable facility in these areas has been of particular concern because of the effect upon nationwide network competition," *Report and Order re VHF Drop-Ins*, 25 Pike & Fischer, Radio Regulation 1687, 1688, 28 F.R. 5498.

<sup>21</sup> ABC's historical disadvantage is the result of its being the latecomer. It came into existence as a network in 1943, as a result of the Commission's decision in the 1941 *Report on Chain Broadcasting* that NBC should not be permitted to continue to operate two radio networks. ABC began life as the former NBC radio Blue Network, with fewer owned stations in key markets and fewer clear channel outlets (R. 5812-5814). While obtaining and going into operation with five television stations of its own by 1949 (R. 5817-5818), it was substantially behind NBC and CBS in terms of competitive affiliates because the major AM affiliates of NBC and CBS were early television applicants and they added television affiliations to their radio affiliations with these networks (R. 5820).

Thus, the enhancement of ABC's competitive position as a television network rests substantially with the fuller development of UHF. As the Commission stated in its 1963 "drop-in" decision, the new all-channel receiver legislation was "no magical panacea. It must be supplemented by positive, constructive action by the Commission and by the industry." (25 Pike & Fischer, Radio Regulation at 1690.) For, " \* \* \* with present technology and equipment the VHF stations generally have a wider range of reception, are more easily tuned on a home receiver, are more economical to operate, and have other operating advantages. Therefore, the hope of providing three full television network services to all major television markets depends upon the development of UHF technology so that UHF transmission and reception is equal to VHF in all significant respects." (R. 5305.)

It was in this context that the Commission found, "[t]he testimony of ITT officials, the exhibits, and the actions taken by ITT since the merger agreement \* \* \* persuasive that merger with ABC will provide ITT with an economic incentive to engage in research and development of technology and manufacture of some equipment that will be of use to ABC and will help to keep ABC in the forefront of technological development in the field." (R. 5305.) Thus, contrary to appellant's view, ITT will have an incentive to aid UHF and it is just such constructive action which the Commission found, and the record shows, will be contributed by ITT because of its interest in ABC's competitive position.

The efforts to improve UHF technology and utilize UHF affiliates included certain "specific proposals," i.e.:

- "(a) The substitution of high power solid state devices for the present transmitting systems;
- (b) The design of cheaper and more efficient very wide band receiving antennas which will operate over the whole VHF/UHF spectrum;
- (c) The improvement of UHF coverage by the application of technical know-how to transmitter site selection;

(d) The improvement of technology to fill in UHF shadow areas and to provide improved UHF translators;

(e) Automation of transmitting equipment to help reduce UHF transmission costs and thus help to equalize it economically with VHF;

(f) The development of a new type of foam dielectric cable which will reduce the transmission loss over the whole UHF band down to the levels of the VHF band;

(g) The development of a complete set of components which will provide television receivers with electronic tuning and give identical performance for all VHF and UHF stations, with push button tuning for all stations." (R. 5305-5306.)

This finding was based upon a memorandum by the ITT Technical Director A. E. Cookson, written in September, 1966 (R. 3362-3366). This memorandum, in addition to listing certain ways in which ITT's technical resources can be brought to bear (R. 3364), also listed certain "specific activities in process" to get equivalent UHF performance (R. 3365), including items (b), (f), and (g) above. Furthermore, while Cookson thought that the memorandum may have been requested for the September, 1966 hearing (Tr. 2837), that does not destroy its validity as a resume of present and future ITT activity on behalf of UHF. Cookson testified that Harold S. Geneen, ITT's President, had been interested all year in the "question of bringing ABC coverage up to some level comparable to NBC and CBS," and had requested a study in February which was assigned to an outside radio engineering firm. That study, which took six weeks, provided much of the background information going into the September memorandum, part of which had in fact been written in July (Tr. 2836-2837). Geneen's overall question to Cookson was "what can we do to help ABC in this technical area." (Tr. 2838.)

The evidence also showed that ITT was developing a UHF transmitter in Germany which it was decided would

be brought to the United States as a result of ITT's interest in ABC (Tr. 2842-2844);<sup>22</sup> that ITT has set up a program for technical support of ABC (Tr. 2846-2847); that Geneen "has a fetish on this coverage question, of bringing the coverage of ABC up to NBC and CBS," and there is "a fairly elaborate program in that direction" (Tr. 2861); and that ITT's technical resources could assist ABC in other ways (e.g., use of lasers, Tr. 2865, on which less money would be spent absent the merger (Tr. 2869-2870); three-dimensional television, Tr. 2865.)<sup>23</sup>

Finally, ABC stated that "with the resources and backing of ITT, ABC in many instances will be able to fore-sake reliances upon secondary clearances on VHF stations in favor of primary affiliations with UHF stations" (Tr. 4131). Appellant incorrectly states that this proposal was volunteered only in the course of interrogation by a Commissioner (Br. 44). The statement quoted above was not made in the course of interrogation. Appellant's reference is to a later statement where, in the course of interrogation, the commitment was reiterated (Tr. 4176). See also Tr. 92, where additional UHF affiliations were proposed at the September 19, 1966 oral hearing.

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<sup>22</sup> This product would now stay on the market in the United States even if the merger does not go through (Tr. 2868).

<sup>23</sup> Further testimony was that adding several million dollars to ITT's \$30 million a year spent on research in high frequency radio would make that research applicable to the broadcast field (Tr. 1939-1940), that ITT had varactor-diodes that might permit a UHF signal to be received on the regular receiver tuner, which was of interest to United States set manufacturers (Tr. 1942-1943), and that because of ITT's interest in ABC it might be interested in going into a pilot community (if ABC wants it) to study and promote full UHF development, something ITT would have less interest in if not for the merger (Tr. 1944-1949).

The fact (App. Br. 45) that the Commission did not send to ITT a letter sent to ten set manufacturers concerning their efforts to improve UHF tuning devices reflects only the circumstance that ITT does not manufacture television receivers domestically. It does not weaken the testimony that ITT has attempted to interest U.S. set manufacturers in its efforts to develop improved UHF tuning.

Surely, the testimony and statements cited above are substantial evidence. In urging that the Commission is wrong and that ABC's long-range interest is not in the development of UHF, because of the possibility of a fourth network, appellant relies heavily and mistakenly (Br. 40) upon the testimony of its expert economist, Dr. Hyman Goldin at Tr. 3053. Dr. Goldin's testimony on this point, set forth in full below,<sup>24</sup> is that there would

<sup>24</sup> Appellant's originally submitted typewritten brief stated (p. 39) that "Dr. Goldin testified that while ABC had a larger short-term interest than its competitors in improvements in UHF, because it lacked affiliates in some markets, its long-term interests were the same as the other two networks." Appellant has rewritten its description of Dr. Goldin's testimony in preparing the brief finally filed. The characterization remains inaccurate in its suggestion that Dr. Goldin considered ABC's interest in UHF to be short-term.

He stated (Tr. 3051-3053):

BY MR. KESTENBAUM:

Q The problem of UHF, Dr. Goldin, has been discussed here and in particular let me refer to the testimony of Mr. Geneen some days ago in which he described, beginning at pages, for the benefit of counsel, 1941 of the record, technical developments which he said if successful would make the UHF signal absolutely competitive and also would make it as convenient and as attractive to the viewer to go to UHF.

Could you state for us in your opinion, Dr. Goldin, the advantages, if any, and the disadvantages, if any, which would result to an existing network if these developments were to [succeed] in the near future and if there were to be a larger number of UHF station outlets throughout the country.

\* \* \* \*

THE WITNESS: The main advantage of ABC, it would benefit particularly in terms of having additional numbers of UHF outlets that would be competitive and, therefore, that they would expect to take their program schedule.

This is certainly an advantage to ABC. It is less of an advantage to NBC or CBS which by and large have better clearances, especially in the daytime. But there are disadvantages as well as for ABC.

One disadvantage would be that if UHF becomes fully competitive, I would assume that in most of the hundred top markets, a large number of them certainly, there would not only be one additional UHF station, but two or more and, therefore, this begins to open up the possibility of an additional network.

Therefore, ABC would now be competing with three other net-



"certainly" be an advantage to ABC "in terms of having additional numbers of UHF outlets that would be competitive," and that a disadvantage would be that additional fully competitive UHF outlets "begins to open up the possibility of an additional network." He said that there would be "both advantages and disadvantages," but did not conclude that fuller UHF development would be adverse to ABC on balance.<sup>25</sup>

Appellant's contentions concerning future technological assistance to the development of UHF by ITT are based upon the inferences it draws from some of the evidence. But, "it is for the agency to draw its own inferences and reach its own conclusions for implementing the statutory mandate. The agency's conclusions must be sustained if supported by substantial evidence even though there is also substantial evidence to support [a] contrary conclusion \* \* \*" *The Lorain Journal Co. v. F.C.C.*, 122 U.S. App. D.C. 127, 131, 351 F.2d 824, 828 (1965), *cert. den. sub nom. WWIZ, Inc. v. F.C.C.*, 383 U.S. 967.

Nor does appellant substantiate its view that the Commission may not properly consider commitments of future conduct and condition its action upon them. It is not the conditions which create the benefit, but rather the underlying commitments.<sup>26</sup> That the commitments and condi-

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works rather than with two other networks and certainly, the audience time would be fractionated and the share of audiences rating in one network particularly, would tend to decline somewhat.

So that there are both advantages and disadvantages if you will from the purely private position of the network in terms of the public interest. I think it is clear that the desirability and need for an expansion of community outlets is there.

<sup>25</sup> Appellant also relies heavily upon a report prepared for ITT by Robert H. Kenmore, then Director of Acquisition Analysis and Investment, which indicates that the lack of access to new competitors in television was an advantage (Br. 41). But this report (R. 3043-3134), based largely on outside studies by financial analysts, was not shown to reflect ABC's views on UHF.

<sup>26</sup> *Office of Communication of United Church of Christ v. F.C.C.*, 123 U.S. App. D.C. 328, 341, 359 F.2d 994, 1007 (1966) (App. Br. 45), is inapposite. The conditions imposed there were found by

tions do not set specific goals or achievements is hardly surprising. Research by its very nature is unpredictable, and the number of UHF stations with which ABC can affiliate will also depend upon significant unknowns and variables, such as the extent to which UHF does develop, and the station performance and facilities of the various UHF affiliates. But there is no reason to assume, as does the appellant, that because specificity is wanting the Commission cannot determine whether there is substantial good faith compliance.

In *American Airlines v. Civil Aeronautics Board*, 98 U.S. App. D.C. 348, 235 F.2d 845 (1956), *cert. den. sub nom. Aircoach Transport Association, Inc. v. American Airlines*, 353 U.S. 905, the Board, in authorizing certain flights by irregular air carriers, found that undue impingement upon the certificated system would not be likely to occur, and announced that if the results were different than it anticipated, it would act to eliminate the adverse effects. The Court stated that, "the assurance of the Board that it will not hereafter permit adverse economic effects to jeopardize the certificated system or to pose a substantial threat to it, should be accepted and respected by this court." (98 U.S. App. D.C. at 354, 285 F.2d at 851.) There is no reason why that ruling is not fully applicable here. Furthermore, here, as in *American Airlines v. Civil Aeronautics Board*, 89 U.S. App. D.C. 365, 368, 192 F.2d 417, 420 (1951):

\* \* \* the regulatory function, certainly in so far as it includes permissive certificates, is a forward-looking function, as an examination of regulatory measures easily demonstrates. In that respect it differs markedly from a purely judicial or quasi-judicial determination of present or past rights. Much confusion has crept into the subject by failure

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the Court to be synonymous with a licensee's basic duty, and were not, as here, related to additional contributions to the public interest. Furthermore, they were merely corrective of alleged past misconduct, whereas here no such misconduct is involved.

to observe that distinction. When a regulatory action contemplates a proposed development, new, not existing, a type of judgment is required which is wholly absent from the mere evaluation of past facts to ascertain a present or past fact. It is in the exercise of that sort of judgment that the much discussed expertise of administrative agencies finds its greatest value. Here is the field of uncertainties, imponderables and estimates. This is where the rule that a conclusion within the realm of rational deduction or inference stands despite differences of opinion, has its greatest applicability.<sup>27</sup>

The lack of definiteness in the commitments and the conditions therefore inheres in the nature of the subject matter. Purported precision here could only be a chimera. Appellant cannot insist upon it.<sup>28</sup>

### III. The Commission Properly Determined That the Merger Will Not Substantially Diminish Otherwise Likely Competition by ITT in Broadcasting and Other Fields.

Appellant urges (Point III, pp. 49-82) that the Commission's failure to accept appellant's argument that the merger would eliminate or substantially diminish potential ITT activity in networking, community antenna television (CATV) and related communications activities, was due to the Commission's failure "to apply the proper

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<sup>27</sup> It may be noted that while the Court emphasized the promotional responsibilities of the Board in that case, it specifically analogized "new radio stations." The Communications Act also directs the Commission to "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." 47 U.S.C. § 303(g).

<sup>28</sup> The appellant, assuming a failure to live up to the conditions, asserts (Br. 48) that it is inconceivable that the Commission could use the "cumbersome weapon" of denying renewal to enforce them. But, the Commission has continuing power to enforce its conditions. Other less formal methods failing, a cease and desist order under Section 312, 47 U.S.C. § 312, would seem to be an appropriate enforcement tool, as would be a forfeiture under Section 503, 47 U.S.C. § 503.

legal standards for appraisal of potential competition" (Br. 49). We believe, on the contrary, that correct standards were applied and that appellant mistakenly analogizes the facts of this case to the facts in those Supreme Court decisions it relies upon where the Court concluded that the elimination of potential competitive activity violated Section 7 of the Clayton Act.

It should be noted at the outset that there is no claim of a Section 7 violation here, and no independent action against the merger has been brought pursuant to the antitrust laws although, if appellant believes its arguments to be well taken, it is difficult to see why no such action has been brought. Be that as it may, the Commission's function, of course, as it recognized (R. 5293-5294), is not to decide antitrust questions as such but to consider competitive consequences as a relevant factor under the public interest standard. *United States v. R.C.A.*, 358 U.S. 334; *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86. It is also agreed by all parties that the approach taken by the courts in examining for potential competition under the antitrust laws is to be followed by the Commission in its examination of possible anticompetitive consequences, and the Commission accordingly analyzed the relevant authorities at some length (R. 5294-5297). Its decision does not depart from their precepts.

#### ***A. ITT Was Not A Likely Independent Entrant Into National Networking***

Appellant urges first (Br. 52-60) that absent the merger with ABC, ITT was a substantially likely independent entrant into network broadcasting as a new fourth network.<sup>20</sup> But the Commission found to the contrary, and

<sup>20</sup> Little need be said concerning appellant's preliminary suggestion (pp. 50-52) that the Commission assumes a network triopoly to be desirable, and that this view colored its approach to the benefits of new network competition. The opinion cannot fairly be so read. And see Notice of Proposed Rule Making concerning competition in

for good reason (R. 5298-5300). The Commission recognized (R. 5298) that starting in the latter part of 1963, ITT became interested in entering television broadcasting through the acquisition of individual stations or groups of stations, or one of the existing national networks. At the same time, ITT had no experience or know-how in broadcasting, and had no compelling reason to enter the market (R. 5299).

Furthermore, the studies prepared for ITT on broadcasting indicated that there were substantial barriers to entry of a fourth network, in terms of the limitation on competitively equal outlets, so that, as a study presented to the ITT Board in connection with the ABC merger put it, "The same station scarcity factors that make ABC's coverage disparity relatively permanent insure that the industry is closed to a fourth network. \* \* \* As a practical matter the number of networks is limited to the present three." (R. 5298.) It was in this context that ITT officials testified unequivocally that ITT had no interest in making an independent entry into the network television market as a fourth network. (R. 5298.) Thus, the Commission did not give controlling weight to testimony of intention. It considered the objective factors of market position and incentive. The record support for these findings is not disputed, and therefore need not be set forth.<sup>30</sup>

Appellant's discussion of the evidence of record (Br. 53-54) demonstrates that ITT was strongly interested in broadcasting. So much is clear. But it does not establish that ITT, even if it had purchased or applied for a group of stations of its own, would then probably have started

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network broadcasting, released March 22, 1965, 30 F.R. 4065, for the Commission's approach to this subject.

See also testimony of Chairman Newton N. Minow, expressing the Commission's unanimous support for the all channel television receiver bill. Hearings before Committee on Interstate and Foreign Commerce, House of Representatives, March 5, 6, 7 and 9, 1962, pp. 120-121.

<sup>30</sup> The Commission's discussion of this evidence at R. 5298 itself contains specific record citations.

a fourth network. This is surmise, rather than a likely result of the market situation. The great problem of finding competitive affiliates would still be present, to a much greater degree than now faced by ABC. And, as ABC's President testified, group owners who do not have network affiliations in some of the largest cities, and who now produce some of their own programs (including Westinghouse), and are thus the existing most likely entrants into full networking, have not started a fourth network (Tr. 1679-1681). The appellant has thus failed to demonstrate that the Commission's conclusion here was erroneous.<sup>31</sup> It has failed to show any strong incentive or any skills existing in ITT which could be applied to the production, acquisition and sale to advertisers of network programming. ITT, for example, is devoid of capabilities for creating a news and public affairs department of national network caliber.

Since the Commission did not, as appellant claims in its Point III, A, 1 (pp. 55-58), give controlling weight to the testimony of company officials that they did not contemplate independent entry, there is no conflict on this issue between the Commission's decision and the Supreme Court cases relied upon by appellant to demonstrate that subsequent testimony of intent is not controlling. But it is important to note further that the objective factors which indicated likely independent market entry in those cases are not present here. Each of those cases dealt with the effect of a merger, acquisition or joint venture upon the likelihood of otherwise independent entry into a market, in the context of a search for a possible loss of substan-

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<sup>31</sup> Other testimony relied upon, Br. p. 54, shows only that network affiliations in New York, Chicago and Los Angeles are important for competitive reasons, and that it is important for a network to own its own stations in those cities for that reason. Appellant assumes that ITT would acquire stations in the few top markets where CBS, ABC and NBC own their own stations, and that therefore it would have a compelling incentive to start its own network. But this possibility takes no account of the general affiliate problem and is not a showing of likely independent entry into national networking that the Commission was required to accept.

tial potential competition which would violate the Clayton Act, Section 7.

In *F.T.C. v. Procter & Gamble Co.*, 386 U.S. 568, 580-581, the Court stated that the evidence "clearly shows that Procter was the most likely entrant," into the liquid bleach market because, *inter alia*, Procter was engaged in a vigorous program of diversifying into product lines closely related to its basic products, sold to the same customers in the same channels, and advertised and merchandised in the same manner. In addition, Procter had already considered independent entry and exerted considerable influence on the market by virtue of its existence at its edge. The only similarity here is that ITT has been diversifying domestically.

In *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 174-175, there were corporations "engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market;" their presence would have been a substantial incentive to competition. There was long identification with the industry, including, for one of the companies, ownership of patent rights and, for the other, actual production of the product. Each had evinced a long-sustained and strong interest in entering the relevant market area. Each had the know-how. Here, ITT has no know-how in networking, had evinced no interest in independent entry and has no identification with the industry.

Finally, in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, the absorbed company, a supplier of natural gas, was physically proximate to the market area, had enormous gas reserves close by, and had already attempted to sell gas in the market area. The Court stated that, "Unsuccessful bidders are no less competitors than the successful one." (376 U.S. at 661.) For the holding in *El Paso* to be applicable here, ITT would have already had to have attempted an independent entry into network television.



Appellant has simply failed to demonstrate the impact of those decisions upon this case,<sup>32</sup> largely because it has failed to recognize the nature of the particular market here involved. The affiliate problem is a substantial barrier to any independent entry, and therefore entry into national television networking by acquisition of one of the three existing networks is a markedly different proposition from forming a new fourth network. The decisions relied upon are, of course, pertinent. But the facts here are materially different from the governing facts relied upon by the Supreme Court to find likely independent entry in those cases.

***B. ITT Curtailed Its CATV Plans Without Regard To The Merger. The Possibility Of A Future Reversal Of This Policy Is Not A Significant Factor.***

Appellant argues further (Br. 61-71) that absent the merger, ITT would have been a participant in a full range of CATV and pay-TV development in competition with the existing broadcasting industry, and that the Commission erroneously failed so to find. The Commission, upon a careful review of the circumstances (R. 5300-5303), concluded that ITT decided to hold up on any CATV or pay-TV expansion without regard to merger with ABC, and that the possibility of a future reversal of this policy if the merger had not taken place would raise only a slight detriment to the public interest, because the future of CATV and pay-TV as substantial markets for entry is itself an added uncertainty. These conclusions were well founded, not only upon the testimony of intent given at the hearing, but upon contemporaneous documentary evidence and the objective factors concerning the general status of CATV.

<sup>32</sup> Finally, the appellant quarrels (Br. 58-60) with the Commission's view that other group owners would be likely entrants into national networking by appellant's standard. But this statement is not substantially significant to the issue presented of ITT's status. Therefore, correct or not, it is immaterial and need not be substantiated here.

ITT's subsidiary Federal Electric Corporation from late 1964 into 1965 embarked upon a CATV program in which it made loans to six CATV systems and secured rights to acquire controlling stock interests.<sup>33</sup> Federal Electric officials were enthusiastic about the future of CATV. On June 25, 1965 Robert E. Chasen, President of Federal Electric, prepared a general review document (R. 2134-2164), in which he spoke of CATV activities being underway on a "broad scale" (R. 2137), and of moving on to new opportunities "[w]ith continued ITT support" (R. 2139); he also stated that it was generally accepted in the CATV industry that the way into pay-TV was by having a transmission grid of CATV available when the day comes, and that "there are plans afoot, and in some areas already underway, to have a Common Carrier Microwave System cover the entire United States, independent of the Bell System, to interconnect the grid of CATV cable systems" (R. 2161).<sup>34</sup> At the same time, the memorandum recognized the presence of "difficult" "problem areas" involving, *inter alia*, the unsettled question of copyright liability, the necessity for getting FCC consent when microwave radio was used,<sup>35</sup> State regulation, and difficulties with telephone companies over use of their poles, sometimes leading to freezing out the CATV operator (R. 2137, 2142-2143). It is this document which the Commission referred to as a "think piece" (R. 5302). The document was sent to John H. Guilfoyle, an ITT Group Vice President (Tr. 848).

On November 1, 1965, the President of ITT sent a memorandum to Guilfoyle, with a copy to Mr. Jack H.

<sup>33</sup> Prior to this time, Kellogg Credit Co., another ITT unit, had made the loans. Federal Electric was an engineering service company (Tr. 836).

<sup>34</sup> These plans were not those of ITT, but were talk heard by Chasen at a convention (Tr. 949-950).

<sup>35</sup> The Commission at that time was conditioning microwave grants on carriage of local stations and non-duplication of their programs by the CATV systems.

Vollbrecht, an executive assistant to Geneen to whom Chasen was then reporting on these matters (Tr. 979),<sup>36</sup> in which he stated that CATV was one of the most potentially prosperous fields they could look into, noted that about \$10,000,000 had been committed, and stated, "The question now arises as to the future rate and amount of acquisition beyond this." (R. 2034.) The memorandum also noted the presence of "a number of important imponderables" in terms of operations, regulation, and relations with telephone companies, which "may become also important risks to the recovery of the investments made in this field" (R. 2034). November 2, 1965 was therefore set for a meeting among top management.<sup>37</sup>

Thus, while it is asserted, upon the basis of the June 25th memorandum and memoranda of November 2, 1965 (R. 2178, 2182) and November 12, 1965 (R. 2226-2228) from Guilfoyle and Chasen, that "ITT management" expressed "consummate interest" in acquiring interconnecting communications carriers throughout the country (App. Br. 62), it seems clear that top management was more cautious.

At the meeting on November 2, 1965 there was discussion of such pending problems as proposed regulation of CATV by the Commission and local public utility regulation (Tr. 952-953), and it was decided by Geneen that CATV activities should be frozen because of his expressed concern about the investment of millions of dollars in CATV (Tr. 930, 938-939, 982-983, 2030-2032).<sup>38</sup> No mention was made of ABC (Tr. 931) and Geneen had no discussions with ABC in 1965 or 1966 concerning

<sup>36</sup> Vollbrecht was asked to look into their CATV activities in October, 1965 (Tr. 1793).

<sup>37</sup> A November 1, 1965 set of pre-discussion notes by Mr. Geneen discusses these matters at greater length (R. 2036-2038).

<sup>38</sup> This did not mean ceasing all activity (Tr. 1781-1782), and ITT officials were not precluded from investigating further (Tr. 1784-1785).

ITT's CATV activities (Tr. 1801). As the Commission found (R. 5301), it was not until November 16, 1965 that Geneen and Goldenson resumed their merger discussions, which had been broken off in February.

Federal Electric was then phased out of CATV, turning over the current operations to a new CATV Division (Tr. 940). Although Geneen had in October of 1965 instituted a procedure of having Federal Electric make weekly reports on the status of CATV operations (Tr. 1786, 1787), Chasen had discontinued the reports (Tr. 935). Geneen also testified that he was not interested in pay-TV (Tr. 2032) and had had only a speculative interest in the possibility of a microwave connection of CATV systems (Tr. 2032-2033).

Vollbrecht, who had been put in charge of CATV matters by Geneen by the end of 1965 (Tr. 979-980), stated that he believed CATV was not a fruitful field (Tr. 994). He also testified that at a meeting of January 5, 1966, it was finally decided not to go forward on CATV (Tr. 984-985, 987), and that he had in fact been stopping additional expansion since November 2, 1965 (Tr. 994-997). He also stated that he did not discuss the matter with ABC (Tr. 973-974, 988), and that so far as he knew no one else at ITT was consulting with ABC on CATV (Tr. 988).

The Commission thus found (R. 5301):

\* \* \* it appears that the January 5, 1966 decision of ITT's CATV Committee to continue the freeze was not premised on the possibility of a merger with ABC. Vollbrecht's approach to CATV was strictly on its own merits. He never discussed this question with anyone at ABC, never discussed with Geneen the effect of ABC on ITT's operations and plans, and did not know or even attempt to ascertain ABC's position on CATV before the Commission.<sup>2</sup> The evidence indicates that Vollbrecht felt that this was not an activity suitable for ITT because in his view CATV systems are fundamentally local, nothing can be gained by ownership of several systems, each

is small, and each requires a lot of management time (T. 994).

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<sup>2</sup> Vollbrecht wrote a CATV status report for Geneen in December 1965 stating, among many other things, "We are aware of the need of cooperation with ABC and plan to work out the details of this as soon as our internal planning has been completed. We also plan to request their audit of our decision to go or no go" (J-126, p. 4). Vollbrecht explained that he would so check with any company in the ITT system which would have an interest or potential interest in the area and was assuming that ABC would become a part of the ITT organization. The reason for the specific check with ABC was because of the latter's expertise in the communications field. Vollbrecht stated, however, that he did not feel a present need to cooperate with ABC, but only felt this would become necessary when and if ABC became a part of the system (Tr. 969-973). This statement is supported by the critical fact that Vollbrecht did not, in fact, check with ABC.

The outline above indicates the immediate situation with respect to ITT's CATV involvement. So far as the broader setting of general developments was concerned, there is no question but that CATV (and any possibility of pay-TV arising out of it)<sup>39</sup> was a chaotic field at that time. In April 1965, the Commission had asserted jurisdiction over CATV systems using microwave radio, and had proposed new rules applicable to all CATV systems, which, *inter alia*, would limit the carriage of television signals by CATV from one city to another. First Report and Order, 38 F.C.C. 683, 30 F.R. 6038; Notice of Inquiry and Notice of Proposed Rule Making, 1 F.C.C. 2d 453, 30 F.R. 6078. The Commission did in fact subsequently adopt such rules effective March 17, 1966, Second Report and Order, 2 F.C.C. 2d 725, 31 F.R. 4540. See *Buckeye Cablevision, Inc. v. F.C.C.*, — U.S. App. D.C. —, — F.2d — (No. 20274, June 30, 1967).

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<sup>39</sup> As the Commission's opinion makes clear (R. 5303), the evidence on ITT's interest in pay-TV was principally that of an enthusiastic proponent of a system who testified that ITT was interested in his system. ITT's people denied a strong interest and there was thus evidence both ways.

The status of local franchising and public utility regulation was also in a state of rapid development. As the Commission noted in the Second Report and Order, the number of CATV systems in operation was already probably over 1800, with over 700 communities having systems franchised but not yet in operation, and with some 900 franchise requests then pending (2 F.C.C. 2d at 738). Federal legislation on the subject was also pending. See H.R. 7715, 89th Cong., 1st Sess., see also H.R. 13286, 89th Cong., 2d Sess. Indeed, many of these problems remain in the same status today. No legislation has been adopted, the Commission's jurisdiction has been cast in doubt by *Southwestern Cable Co. v. United States*, 378 F.2d 118 (C.A. 9, 1967), petition for a writ of certiorari pending, No. 363, and the Second Circuit has imposed copyright liability upon CATV systems, *Fortnightly Corp. v. United Artists*, 377 F.2d 872 (C.A. 2, 1967), petition for a writ of certiorari pending, No. 618.

It was in this setting that the Commission, upon careful findings, concluded that the merger was not responsible for ITT's decision not to make a stronger entry into CATV and that, taking account of the possibility that ITT might someday change its policy, only a slight detriment could be found to the public interest (R. 5303). This was not erroneous reliance solely upon the testimony of ITT personnel, since the testimony was consistent with contemporaneous documentary evidence. It was, in any event, entitled to be judged on its merits. *National Labor Relations Board v. Camco, Inc.*, 340 F. 2d 803 (C.A. 5, 1965), *cert. den.* 382 U.S. 926. Nor was the Commission's decision erroneous for failure to "set forth the basis for its judgment that the ITT testimony was controlling" (App. Br. 67). This is a requirement for validity enunciated only by appellant. Factual findings, even upon conflicting evidence, need only be supported by substantial evidence. What is required to be explained is the judgment based upon the facts. That explanation was plainly given here.

Finally, it was clearly proper for the Commission to take account of the regulatory background to ITT's decision. This does not mean that the presence of regulatory review eliminated the importance of preserving aggressive independent competitors, but that ITT could make decisions "independently as business judgments" (R. 5303) based in part upon the regulatory situation. The basic question again, as with respect to the alleged likelihood of independent entry into national networking, was whether the record showed ITT to be such a major force at the edge of the CATV market as to exert a substantial influence upon that market by its very presence. See *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158, 174-175. And, in considering this issue, it was relevant to note the presence of scores of other companies in the field as one factor, even though no study had been made of their size relative to ITT. ITT's technological resources cannot be conclusive; the Supreme Court has posed no such narrow standard. Intent and incentive are factors of major significance. Here these factors were adverse to a finding that ITT would have forged ahead in the nationwide CATV market but for the merger, and to a finding that CATV today, or in the foreseeable future, would be substantially more potent as a competitor for television broadcasting if ITT were not merging with ABC.<sup>40</sup>

***C. The Merger Will Not Result In Any Diminution  
Of ITT's Development Of New Technologies.***

Appellant also urges (Br. 72-82) that there will be a substantial detriment from the merger in a loss of vigorous ITT activity looking towards development of new technologies—in particular, broadcasting via satellite—which will multiply the channels of access to the public.

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<sup>40</sup> Thus, it is highly unrealistic, and based upon nothing of record, to suggest that ITT is needed to urge regulatory policies on behalf of CATV.



The Commission did not find this effect (R. 5303-5305), and the Commission's finding was reasonable.

When the Department of Justice wrote to the Commission on December 20, 1966 (R.-87, Appendix to dissent of Commissioner Johnson), after conducting an intensive study, it mentioned the possibility of direct satellite broadcasting to the home, and stated that, "ITT's commitment to a heavy investment in an existing network may blunt its efforts in developing the technology for competitive broadcasting methods." It also stated, however, that the possibilities of anticompetitive consequences in the merger were "sufficiently speculative" that no antitrust action was being contemplated, in short, that there was not a likelihood of a substantial lessening of competition. The situation after the adjudicatory hearing remains the same.

It is important to note on this issue that the situation is not that of a company being removed from the competitive market by being absorbed, or of a company entering a market by acquisition and thus giving up all potential for independent entry. The only claim here is that ITT, which concededly will remain in satellite technology, may lose its incentive to push ahead vigorously. But this has not been shown to be a likely consequence with substantial public harm, and there is substantial evidence to the contrary.

Dr. Joseph V. Charyk, President of the Communications Satellite Corporation, testified that direct satellite broadcasting to the home could be accomplished within five years as a technical matter (Tr. 2257-2258). He thus indicated that the basic technology had already been developed, a conclusion specifically testified to by ITT's technical director, Albert E. Cookson (Tr. 2858).<sup>41</sup> Charyk

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<sup>41</sup> Cookson also testified that the basic technology for broadband systems coming into households as "Home Communications Centers," was fully known and shared, and that it was mostly an economic problem (Tr. 2866), whose development ITT could not retard if it wished to (Tr. 2867).

also stated that such other leading companies as Hughes Aircraft Company, Collins Radio, RCA, General Telephone and Electronics Co., Page Communications Engineers, Inc., and Philco-Ford were engaged in equipment manufacture, and research and development for ground stations used in satellite communications, and that Hughes, RCA and Philco-Ford (along with ITT) were most important in producing the communications equipment used in satellites (R. 3838).

Upon a record showing that the basic satellite technology was already developed and that other leading companies were in the field, there was surely eminent sense to the testimony of ITT's President that ITT would continue to have an interest in developing a satellite for direct broadcasting to the home because, "Basically you can't hold back progress no matter how you try. If this is what is coming we are going to be up in the fore-front. Whether you are going to use it for broadcasting or not is going to be a decision of the Commission, not a decision of the ITT." (Tr. 1846-1849.) Cookson similarly testified that ITT could not hold back such developments (Tr. 2867). It seems reasonably clear that ITT, as a matter of self interest, will have to proceed vigorously with satellite broadcasting techniques, although as Geneen recognized (Tr. 1856-1858), they may have effects adverse to ABC's network interests.

Furthermore, appellant's witness Albert G. Hill, Professor of Physics at MIT, agreed that, based on his general familiarity with ITT, that company would make technological advances even though it might mean obsoleting something another part of the organization was doing (Tr. 1752). This corroborated the testimony of Cookson to that effect. Cookson stated that it was ITT's research policy to move ahead as fast as they could in all product lines, pointing out that ITT was a leading company in satellite research and development even though satellites will obsolete undersea cables, one of ITT's biggest businesses (Tr. 2860-2861). No one in

authority had ever interfered with the undertaking of a new technology (Tr. 2861).

Finally, it was recognized by all (e.g., Charyk, Tr. 2263-2264), as the Commission found (R. 5304), that future developments in this area will require basic policy decisions by the Commission, and perhaps by Congress. As the Commission concluded, and in light of all of the pertinent factors, the merger of ITT and ABC will not be a significant factor in this picture. Of course, it is of substantial importance to have a large company vigorously pursue a new technological development, even though government consent and regulation are involved. But here, to sum up, ITT is, and will remain, in the field; the basic technology is already developed; other leading companies are actively engaged in the same area; and ITT has a policy, history and present incentive to remain among the leaders. In that context, and given the uncertainties of future government policy, there is no particular likelihood that the merger of ITT and ABC will have any significant effect upon the future development of satellite and associated techniques for enlarging the channels of communicating to the American public.

**IV. The Commission Properly Appraised the Effect of the Merger Upon ABC's Future Operations in Regulatory Proceedings, the Advertising Market, and News and Public Affairs.**

***Introduction***

Appellant claims (Point IV, pp. 82-113) that the merger will have important adverse effects upon ABC's operations, in that it will destroy ABC's independent role in regulatory proceedings, will create opportunities for reciprocal dealing in the advertising market, and will seriously impair ABC's integrity in presenting news and public affairs programs. These questions were fully considered by the Commission, and determined upon the entire record in a manner well within the ambit of the Commission's discretion.

It should be noted at the outset that appellant has misread the Commission's decision on one of these three issues. For, while appellant asserts (Br. 82) that the Commission found "that the merger will not have *any* effect," the Commission in fact found "that there is a possible area of conflict" between the broadcasting interests of ABC and the common carrier interests of ITT in regulatory proceedings, although it deemed the consequent detriment not to be of "a major nature." (R. 5310.) Furthermore, appellant is at pains to prove (Br. 87-88) that ITT and its subsidiaries form a highly centralized system. But there is no dispute on this. The Commission found (R. 5307) that, "The evidence supports the conclusion that the ITT organization generally operates with centralized controls, particularly in financial matters, over the ITT subsidiaries." Appellant insists that this means that there will be continuing pressure to conform ABC's relationship to the same pattern, and relies upon certain cases and evidence of record to demonstrate that ITT and ABC must of necessity have a close relationship with pervasive control by ITT.

Thus, it is said (Br. 90) that ABC's President, "recognizing the facts of life," "testified that Mr. Geneen alone could bring any matter up to the ITT Board," suggesting close oversight of all ABC operations by ITT. What Mr. Goldenson made clear in his testimony (Tr. 1641) was that he expected ABC's normal operations to be handled solely by ABC, with something like an unusual capital expenditure being taken to the ITT Board. Appellant also gives particular treatment (Br. 90-91) to normal ITT-ABC contacts looking toward the sort of co-operation that may be expected to flow from the merger. But by themselves these are hardly sinister. The significant question before the Commission was the effect upon ABC's operation in the public interest, and this depends not merely upon the fact that ABC will be a wholly owned subsidiary of ITT but more importantly upon the relationship of that fact to the entire context within which the two companies operate.

The Commission found (R. 5307-5310) that ABC would have a special relationship within ITT's structure; despite appellant's disbelief, this is not something inherently impossible. The finding rest upon facts whose record support is not contested: that ITT recognizes that ABC should remain autonomous with respect to other parts of the structure, that ABC will have a Board of Directors a majority of whom will be "outside" directors not employed by ABC or ITT, that the ITT Board of Directors will also have added to it four ABC directors, two of whom will not be ABC employees, and that ordinary operations are to be conducted by ABC itself. In addition, there will be no ITT group executive over ABC. The Commission specifically found that the form of organization "is some assurance that ABC will continue to operate with a substantial degree of autonomy." (R. 5309.) But the Commission did not stop there. It recognized as well as appellant that this was not a subject free from doubt. It considered the possibility that ABC might not operate with the claimed degree of autonomy (R. 5310), and decided that, "while there would be countering adverse consequences [to the value of ITT participation], analysis shows that they are not of a substantial nature." Appellant's burden, which it has not met, was to demonstrate an arbitrary character to the Commission's disposition of the autonomy issue in the three areas raised by appellant here and before the Commission.

***A. ABC's Role In Regulatory Proceedings Presents A Small Area Of Conflict.***

Appellant argues its position concerning ABC's future role in the regulatory process (Br. 93-97) upon the premise that the Commission found no detriment (Br. 93) and "erred in failing to weigh it in the public interest" (Br. 97). The difficulty with this position is that it rests upon a mistaken characterization of the Commission's decision. As noted at the outset of this point, the Commission agreed that there was a possible area of conflict,

but concluded that the detriment was not a major one (R. 5310). Appellant may disagree with this conclusion, but it may not ignore it.

As appellant claims (Br. 84-86), the Commission in its field, and the courts in antitrust cases, have examined closely the possibility of adverse effects arising out of cross interests in competing corporations, and have regarded control and influence with a practical eye. But the cases it relies upon involved directly and fully competitive areas of activity, e.g., the ownership of two radio networks by one company (*Report on Chain Broadcasting, 1941*), the ownership of the sole television station and a CATV system in the same community (*Citizens TV Protest Committee v. F.C.C.*, 121 U.S. App. D.C. 50, 348 F.2d 56 (1965)), or interests in competing watch companies (*Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn., 1953), *aff'd*, 206 F.2d 738 (C.A. 2, 1953)). In those cases, the impact of the common interest was manifestly substantial in terms of the entire scope of the business activities of the companies. Here, the Commission reasonably concluded that there was a small area of conflicting interest (R. 5310).

As mentioned above, the Commission found a conflict of interest between ABC and ITT in the area of international common carrier operations. Appellant needlessly buttresses this finding (Br. 94-95) by pointing out that NBC has not joined CBS and ABC in vigorously urging that networks be permitted to deal directly with the Communications Satellite Corporation, rather than with the international carriers as intermediaries, in purchasing international satellite circuits, a course of conduct it believes due to accommodation with RCA's interest as an international carrier. It is unable, however, to demonstrate that the conflict of interest in the international area will assume significantly greater proportions than found by the Commission, since a television network's use of common carrier facilities is overwhelmingly domestic (R. 5310). Thus, appellant's expert witness, Professor Harvey J. Levin, stated (R. 3896) that, "the share of

[domestic] satellite circuitry that TV is expected to account for is far greater, relatively, as well as absolutely, than in the international system."

And appellant makes no showing that the Commission erroneously failed to find a greater area of conflict in the domestic area. It argues that ABC has heretofore been a vigorous advocate of a private domestic satellite to transmit network programs, and that its merger with a carrier will create a clear conflict that may blunt its future advocacy.<sup>42</sup> But ITT is not a domestic carrier, and thus has no direct conflicting interest here. While Professor Levin stated (R. 3862-3863, 3895) that all carriers as a class would have a policy objection to a domestic satellite owned by private users rather than by a common carrier, he also stated (R. 3905-3912) that international carriers such as RCA and ITT, which are also manufacturers, would have an interest in a private satellite as potential suppliers of "hardware."

It is not surprising, therefore, that Professor Levin, in discussing ABC's espousal of a private domestic satellite, testified that he did not believe ABC had become "unsold" on the idea since announcement of the merger (Tr. 2902-2903). Only as a "nuance" did he find a recent ABC statement on the subject, which contained less technical backup material than he expected, to be less enthusiastic than previous statements (Tr. 2905-2907). He found no other change in ABC's position despite the proposed merger.

It is similarly not surprising that appellant's attempt to use the NBC analogy in this area fails. Appellant asserts (Br. 94) that, "NBC has refrained from taking a position on whether private domestic TV satellite systems should be authorized." But NBC, as opposed to COMSAT, has urged recognition of the legality of private domestic satellite systems, although it reserved judgment on whether they are in the public interest at this

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<sup>42</sup> COMSAT has opposed the idea of a private domestic satellite; it seeks to obtain any authorization given for a domestic satellite.



time (R. 3898). Dr. Levin made clear (see R. 3895-3912) that on the domestic side the international carriers do not have any area of strong conflict with networks interests.

In sum, there is no wide conflict of interest between ITT and ABC which will largely destroy ABC's independent voice in regulatory proceedings. Appellant, whose brief somewhat blurs the distinction between the domestic and international aspects of this question, merely has its own view of the situation. But that view is not compelling. The judgment as to the likelihood and significance of the loss of an independent ABC voice in the limited areas of potential conflict demonstrated on this record, was one for the Commission to make. There has been no showing that this judgment conflicts with any judicially established or otherwise required approach to the problem.

Indeed, appellant concludes its argument on this issue by recognizing that loss of ABC's independent voice is not a certainty. It urges that the potential of such impairment resulting from the merger is a detriment which should have been weighed in the public interest. (Br. 96-97.) The short answer to this argument, as pointed out above, is that the detriment was in fact weighed by the Commission.

***B. There Is No Indication That Significant Reciprocity  
In The Advertising Market Is Likely.***

Appellant urges (Br. 97-100) that the Commission erred in failing to find a claimed substantial likelihood that ITT will engage in the anticompetitive practice of reciprocal trading with those of its suppliers who also use television advertising. As is the case with respect to other issues, it is claimed that the Commission relied only upon the applicant's self-serving declarations in the face of unequivocal market structure evidence to the contrary. But here again this claim cannot be sustained. The record simply fails to show the likelihood of any reciprocal dealing which could substantially affect the television ad-

vertising market.<sup>43</sup> Indeed, appellant has failed to make the sort of market analysis it believes both relevant and essential.

The claim of a substantial opportunity for reciprocity rests solely upon the facts that ITT, "as a highly diversified company, makes substantial purchases from companies which are important network advertisers," eight of which account for about 8% of total network advertising revenues. (App. Br. 98.) This is hardly compelling structural evidence of a significant probability, in the absence of a showing of the importance of the purchases by ITT to the eight companies and a showing for each company of the importance of its advertising in the television network market.

The cases relied upon by appellant (Br. 98) do not help it here, as the Commission found, R. 5312-5313, because they hold that a mere possibility of reciprocal dealing is not enough, and that a substantial probability must rest upon actual conduct, intent or leverage. In *F.T.C. v. Consolidated Foods*, 380 U.S. 592, there was post acquisition evidence of attempted, and sometimes successful reciprocal dealing, and, as Mr. Justice Stewart's concurring opinion makes clear, Consolidated had leverage over the companies which shifted their buying to Consolidated's subsidiary. In *United States v. Ingersoll-Rand Company*, 320 F.2d 509 (C.A. 3, 1963), Ingersoll-Rand was found likely to engage in reciprocity between its own purchases of steel and sales of machinery by its acquired subsidiaries to coal mining companies who needed the good will of the steel industry. There the leverage was found by the district court in the fact that Ingersoll-Rand's "purchases are important to the steel companies;" it was the fourth largest general industrial machinery manufacturer. *United States v. Ingersoll-Rand Company*,

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<sup>43</sup> As the Commission's opinion shows (R. 5311), it had also been urged that the merger would foreclose ITT's advertising expenditures to the other television networks. The Commission found (R. 5313) that ITT is not an important national television advertiser, and this point has not been pursued upon this appeal.

218 F. Supp. 530, 552 (W.D. Pa., 1963). It has not been shown to be in a comparable position as a purchaser. Finally, in *United States v. General Dynamics Corporation*, 258 F. Supp. 36 (S.D.N.Y., 1966), reciprocity was actually planned and engaged in. None of these essential elements is present here.

In view of the above market structure considerations, and the Commission's uncontested findings (R. 5314) that there was no evidence that either ITT or ABC had ever engaged in reciprocity, that ITT has a policy against it, and that ITT's purchasing is decentralized (so that reciprocity would require illegal concert among the subsidiaries), it is clear that anticompetitive reciprocal dealings here are merely a possibility and not a substantial probability.

*C. The Commission Properly Concluded That The Integrity Of ABC News Would Not Be Affected.*

Appellant also urges (Br. 100-113) that the Commission could not reasonably conclude that ABC's independent judgment in news and public affairs programs would remain unimpaired after the merger. The Commission fully recognized the importance of this question, and dealt with it at length in its original opinion of December 21, 1966 (R.-87, pp. 10-11) and the opinion on reconsideration (R. 5322-5326). The result it reached is a proper reflection of the record before it in light of "the deposit of its experience, the disciplined feel of the expert, \* \* \*" *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 91.

Independent news coverage by the national radio and television networks is essential. The slanting of news coverage or documentaries in order to propitiate foreign governments, or any other extraneous interest, would be abhorred by all. Conscious, or even unconscious toadying to such interests by news personnel would be just as undesirable, even absent specific instructions that they do so. The fact that ITT has unusually extensive foreign interests raises a legitimate question of whether any such

improper conduct is likely.<sup>44</sup> It does not, however, as appellant apparently believes, answer the question.<sup>45</sup>

The Commission's experience is that such factors have not in the past lead to corruption of news and public affairs programs, and that neither the nature nor the extensiveness of licensees' non-broadcast interests has played any part in converting the potentiality for abuse

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<sup>44</sup> Every licensee has his own political and social views, yet the Commission may not inquire into these views. *Johnston Broadcasting Co. v. F.C.C.*, 85 U.S. App. D.C. 40, 48, 175 F.2d 351, 359 (1949). Every licensee holds his license subject to withdrawal by the Government. Some licensees may be heavily engaged in national defense work, or be subsidiaries of large contractors. Others have other types of broad business interests. ABC itself now has interests in television stations or television production in 11 Latin American countries, Australia, Canada, Lebanon, Japan, The Netherlands, Okinawa and The Philippines (R. 5988). And, as appellant has pointed out (Br. 105), a network in addition faces the problem of satisfying its affiliated stations.

<sup>45</sup> Appellant stakes its position essentially upon the nature of ITT's foreign interests. It also relies (pp. 109-113) upon contacts with a reporter for The New York Times by ITT's Vice President for Public Relations, which the Commission found to be both improper and isolated (R. 5323-5324), and (p. 111) contacts by two other ITT representatives with the same reporter. The other contacts with the reporter were clearly within the range of normal "beefing" by any person who is dissatisfied with a newspaper's treatment of him, and do not seem to differ materially from contacts with AP and UPI reporters which the Commission also found to be proper and which appellant does not question. Thus, while appellant finds reprehensible (Br. 111) Mr. Horner's statement to the Times reporter that she was "unfair" in writing that the Justice Department would appeal if the Commission did not reopen the proceedings (Tr. 2964-2965), it does not question the propriety of complaints that AP stories were inaccurate and incomplete (Tr. 2997-3001), or a similar complaint about a UPI story (Tr. 3005-3007), which led to a change with which the reporter did not agree (Tr. 3017). The other contacts relied upon therefore do not indicate any attempt at improper pressure. Finally, appellant goes outside the record (Br. 113, footnote 105) to suggest some other conduct which it has not brought to the Commission. Appellant, despite the size of investigative forces available to it, has failed to show that the isolated example of improper conduct found by the Commission is representative of ITT conduct generally. The Commission's finding should stand.

into actuality. Non-broadcast interests of licensees have simply been irrelevant to the integrity of their news operations. (R. 5324-5325.)<sup>46</sup> Nor may this experience, or the Commission's promise of continuing scrutiny, be dismissed on the basis that (App. Br. 108-109) the Commission does not monitor programs and has never made specific inquiry into the impact of licensees' other interests upon news and public affairs programming. For, evil will out. Irregularities of this sort would surely have come to the Commission's attention through the years if they in fact existed, particularly in the case of networks, whose programs are subject to the interested attention of their affiliates as well as of partisans of various shades of opinion on every issue.

There is also more than wishful thinking to the assertion that slanting of news is unlikely to go undetected. See *KMPC, Station of the Stars, Inc.*, 14 F.R. 4831, 14 F.R. 6096 (1949), setting transfer and renewal applications for hearing on charges of slanting news broadcasts to conform to a licensee's personal views. See also this Court's statement in *Noe v. F.C.C.*, 104 U.S. App. D.C. 221, 225, 260 F.2d 739, 743 (1958), *cert. den.* 359 U.S.

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<sup>46</sup> The Commission thus stated in its original decision, and repeated upon reconsideration (R. 5324-5325):

"The Commission decision found 'in our experience with numbers of other licensees who encompass, along with broadcast interests, large and diversified nonbroadcast activities no indication of abuse of their public trust through the intrusion of their non-broadcast concerns upon the objectivity of their news reporting or commentary and no demonstrated detriment in any other programming sectors.' Decision, par. 30. Moreover, the Commission examined 'in considerable detail' and 'weighed carefully' ITT's foreign interests as they might affect the merger. The Commission concluded that 'We know from our experience in the regulation of communications that many of our large broadcasting licensees and the two other television networks also have substantial foreign interests, including subsidiary corporations in many countries. We have seen no evidence at any time that any of these foreign interests has influenced any of the programming presented in this country. There is no reason to assume or suspect any such influence will occur in the case of ITT.'"

924, that "should Loyola in the future fall short of the rules and regulations of the Commission in regard to proper programming, the Commission may always review the matter in a renewal proceeding or otherwise. See *Trinity Methodist Church, South v. Federal Radio Commission*, 1932, 61 App. D.C. 311, 62 F.2d 850, certiorari denied, 1933, 288 U.S. 599, 53 S.Ct. 317, 77 L.Ed. 975."

The Commission's experience is fortified in this case by a record giving every assurance that ABC news will remain truly independent. ITT has made clear that it is aware of the problem and would never interfere with ABC news. Not only has ITT adopted a specific policy statement (R. 5325-5326) assuring the inviolability of ABC news operations,<sup>47</sup> but both Mr. Geneen (Tr. 531) and Mr. Goldenson (Tr. 242) have made clear their personal understanding of the necessity for absolute integrity in this area. These statements in turn are strengthened by the actual independent operation of ABC's news personnel, whose integrity is not in question.

ABC news is a separate division headed by a President, Elmer Lower. Supervised generally by ABC's Executive Vice President, he is responsible for all news coverage, public affairs programs, documentaries and special events (Tr. 3265-3266, 3271-3272, 3299-3301). Appellant concedes (Br. 107) that there is no evidence that ABC's management has involved itself in the day-to-day running of regular news programs. The news budget is approved by the Board as a lump sum (Tr. 2574-2576) and, while the ABC Board would pass upon an unusually large

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<sup>47</sup> This statement reads in part:

"The independence of ABC programming from any other ITT commercial or other similar interest shall be inviolate. No officer, employee, or agent of any ITT System company or group shall take any action or make any attempt to influence in any way whatsoever in the news, special events, entertainment, or other programming of the ABC network or stations for the purpose of attempting to further, or to avoid conflict with, the commercial or other interests of an ITT System company or group."

expenditure for a documentary or news coverage (Tr. 2576-2577), the only project Mr. Lower knew of that had ever gone before the Board was a program on Africa (Tr. 3284).<sup>48</sup> Lower agreed that mass resignations, including his own, would follow any ITT attempt to influence ABC news policy (Tr. 3301-3302). So far as he knew, nothing in present procedures would be changed after the merger (Tr. 3274).

Overt action to influence ABC news and public affairs coverage is therefore not only not likely, but would seem to be the most unlikely sort of speculation. Nor has an unconscious trimming of news judgments on the part of ABC's professional news staff been shown to be more likely. ITT's interests do not, after all, relate to more than a minute part of the myriad subjects normally covered by a network, and it is hardly likely that the news personnel will even be familiar with many of these interests. Appellant points out that ITT owns utilities in Chile and Peru (Br. 102), and receives about 7% of its total sales from Spain (Br. 104). But who in the ABC news department is even likely to know of particular ITT interests, in the absence of some rare direct news item concerning them? The President of ABC News, when asked if he was aware that ITT has worldwide holdings, replied, "I have just read generally about it." (Tr. 3276.) He did not know that ITT has a large business enterprise in Germany (Tr. 3279). And, while ABC has bureaus or part-time employees in some foreign countries, who might as a matter of speculation be expected to be more familiar with ITT interests in those countries, the record shows that they are in very few of the countries where ITT operates (Tr. 3276-3279). ABC buys news from AP, UPI, Reuters and The New York Times (Tr. 3279).

In sum, the record does not provide support for a conclusion that ABC news will be affected in any manner

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<sup>48</sup> The record does not show it, but this program was recently shown in a four-hour time period.



by the merger. It is conceivable, but most unlikely. The Commission reasonably concluded (R. 5326) :

Considering these assurances and the authority which the Commission has with respect to its licensees, the organizational arrangements between ITT and ABC, discussed above, by which ABC has a number of directors who are independent of ITT, the independence of the ABC News organization within ABC, the tradition and ethics of journalistic independence and integrity, the competitive necessity of maintaining public confidence in the integrity of broadcast news sources, the check upon news integrity which other competitive news sources provide, and all the other factors mentioned above, we find that there cannot be any reasonable doubt that the integrity and independence of ABC's activities in the news, information, and public affairs field will be maintained after the merger.<sup>49</sup>

**V. The Commission Correctly Determined That No Finding of a Lack of Candor Was Warranted.**

Appellant alleges that the Commission erred in failing to find a lack of candor in the applicants.<sup>50</sup> This question, of course, depends upon the reasonableness of the Commission's view of the whole record, and a favorable finding will not be disturbed where it is supported by the record. *City Cabs, Inc. v. F.C.C.*, 107 U.S. App. D.C.

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<sup>49</sup> Appellant also urges (Br. 103) that the Examiner improperly excluded an exhibit which was "relevant to show the character of the foreign involvements in which ITT normally engages." This material was excluded because it was over 10 years old (Tr. 2810), and appellant concedes that remoteness in time is relevant to any allegations of misconduct. Since appellant told the Commission (R. 5175) that no impropriety was being alleged, relevance is claimed only to show the nature of ITT's foreign involvements, about which there is no dispute. There can thus be no prejudicial error in the ruling.

<sup>50</sup> Appellant did not urge the Commission to disqualify the applicants as licensees on this ground (Proposed Conclusions, pp. 105-106, R. 5168-5169).

136, 275 F.2d 165 (1960); *Scripps-Howard Radio, Inc. v. F.C.C.*, 89 U.S. App. D.C. 13, 189 F.2d 677 (1951), *cert. den.* 342 U.S. 830. As this Court stated in *Kidd v. F.C.C.*, 112 U.S. App. D.C. 288, 289, 302 F.2d 873, 874 (1962), "Within fairly broad limits, the relative weight to be given to all the relative factors presented must lie in the sound discretion of the Commission."

The Commission fully considered the claims made by appellant that certain fragments of testimony were unsupportable and thus showed a lack of candor (R. 5327). It considered all but one of the items as not requiring specific discussion, and was of the view that, "It would be quite unwarranted to draw any inferences as to candor or character from such relatively minor aspects of the testimony and proceedings."

Thus, appellant charges that Mr. Goldenson had incorrectly represented at the September, 1966 hearing that an ABC loan agreement with Metropolitan Life Insurance Co. limited ABC's total borrowing to 50% of its assets, or \$6 million of additional borrowing leeway. The Commission found that although the loan agreement did not contain the 50% restriction, it did have other borrowing restrictions (R. 3666-3667), that Metropolitan was concerned with ABC going over 50% of its assets, and that Goldenson could reasonably have believed ABC was so limited.

The record shows that Mr. Simon B. Siegel, ABC's Executive Vice President, told Goldenson shortly after the September, 1966 presentation that the intent of his statement had been correct, to show that there was a limit on ABC's borrowing power,<sup>51</sup> but that its wording was wrong because a 50% limitation was not written into the loan agreement. (Tr. 2453.) Siegel and Goldenson also testified that they decided it was not necessary to advise the Commission of the inaccuracy because there was in fact less borrowing power left in actual dollars than had been

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<sup>51</sup> ABC had to obtain Metropolitan's consent to secure additional loans elsewhere (Tr. 1326-1329).

indicated to the Commission (Tr. 1584-1585, 2453-2456). The Commission had been told at the September, 1966 hearing that ABC could borrow \$6 million more. Golden-son said that when they recomputed the figures later, upon the basis of 50% of assets, only \$3.5 million of borrowing was actually left.

Their belief that ABC was limited to 50% of its assets was based on Siegel's understanding of a warning by Mr. Charles Charbonnier, a Metropolitan Vice President, given at the time Siegel sought a waiver of the loan restrictions in the agreement so that ABC could obtain a further \$25 million loan from another party, that ABC was getting close to a danger point of 50% of its assets (Tr. 2457). This conversation had been reported to Golden-son (Tr. 1584-1585, 2457-2458), and was the basis for his statement to the Commission. Charbonnier, who did not recall the details of the conversation with Siegel, testified that, "it would have been perfectly reasonable for me to have said that we would not want to permit the company, we would not want to consent that the company create debt in excess of 50 percent because they were pushing 50 percent at the time." (Tr. 1332.)<sup>52</sup>

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<sup>52</sup> In a letter to the Department of Justice, Charbonnier also stated (R. 845):

"Since March 30 I have had reason to talk with Simon Siegel of ABC on another matter. In talking with him I mentioned that you had asked about a 50% debt ratio. He told me that in one of our earlier telephone calls, when the Company was contemplating its \$25,000,000 bank borrowing, I had indicated to him that we would not like to see the Company exceed this ratio.

I do not recall the details of this telephone conversation, but at the time I certainly was aware that ABC was approaching a 50% debt level and in view of this condition it would have been normal for us to indicate that we would not like to consent to the incurrence of additional senior debt which would result in a debt ratio of 50% or more. As I might have indicated on March 28, a 50% total debt ratio (i.e., total senior and subordinated debt as related to total net tangible assets) is quite common in both public debt issues as well as in debt issues that are placed directly with institutional leaders."

The Commission therefore reasonably concluded that there had been no intent to deceive. The Goldenson statement of September, 1966 was admittedly not correct insofar as it referred to a contract clause, but it had a basis in fact which at the least warranted the Commission's refusal to make the requested severe finding that due candor had been lacking. If, as the Commission found, ABC had reason to believe that its ability to make additional loans would be limited to 50% of its assets, and that this came to \$3.5 million, candor did not require a correction of the finding made by the Commission in its first decision, upon the basis of the Goldenson statement, that ABC had only \$6 million of borrowing power left. It was not a critical error, since it understated what they believed to be the actual dollar restriction.

The Commission similarly refused to view the other instances as did appellant. These were either passing statements, as was the case with Geneen's September, 1966 statements concerning the nature of ITT's involvement with CATV and broadcast stations,<sup>53</sup> or matters which are not so clear as appellant believes. Thus, it said (Br. 117) that Geneen in the September, 1966 hearing stated that ABC would not be "a lot different than" other ITT entities, which he claimed were substantially autonomous, and that since the Commission has now found—as appellant claims is clear—that ABC will have a very different status, the correct situation should have been

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<sup>53</sup> Thus, Geneen made a reference to "people who purported to think we should get into stations, and that sort of thing, but we never got anywhere with that," in the context of a question as to whether ITT had considered going into networking by way of purchase of a group of stations or backing someone else's new network (Tr. 591-592.) As shown above, ITT had no serious interest in independent entry, and it did not in fact "get anywhere" with any station purchases.

With respect to Geneen's reference to "very small CATV experimental operations" (Tr. 121-122, 516), there is no reason to consider this not to be his accurate view of an investment of about \$7 million in a handful of CATV systems out of some 1600. This is particularly so in light of the decision already made not to go further with CATV.

candidly disclosed in 1966. But this does not demonstrate a lack of candor.

First of all, Geneen may well have considered ITT subsidiaries to be more "autonomous" than they look to others. But, in any event, he was not evasive on this question. In his September, 1966 testimony, he made clear that while local management of subordinate companies and divisions were expected to carry out their own business planning, as well as day-to-day operations, there was, at the same time, a centralized coordination (Tr. 165-167, 503-506). It was in this context that he stated that the proposed ABC operation was harmonious with the system (Tr. 167), and would not be "a lot different in certain respects as to details." (Tr. 503.) He made clear his view that ABC would be expected to operate on its own, but that differences of opinion would be settled by the ITT Board (Tr. 503-506).

That the Commission has found that ITT generally operates with centralized controls, particularly in financial matters, is not so far from Geneen's testimony as to raise any issue of candor, any more than any other failure to make findings exactly as proposed by a party. Indeed, appellant's confusion as to its own position on the issue of ABC's status makes a claim of lack of candor inappropriate. It states (Br. 117) that it is clear that ABC's status would be very different from that of other ITT companies. But it also insists that ABC will similarly lack autonomy. Appellant is thus inconsistently arguing both that ABC will have a very different status from other ITT subsidiaries and that it will be just like them in lacking autonomy.

Appellant claims further (Br. 118, footnote 110) that Geneen stated that the ITT Board's endorsement of ITT's \$50 million commitment to ABC "was reflected in its minutes for October 12, 1966." This is said to show a lack of candor because the minutes show no Board action in terms of a financial commitment. That this claim raised no substantial question is best demonstrated

by examination of Geneen's statement and the minute entry. Geneen was asked what action, if any, the Board took. He stated (Tr. 2021):

The Board took what we generally considered Board action, which is an endorsement in principle, a reflection of the minutes \* \* \*

The minute of October 12, 1966 states (R. 1508):

(Excerpt—Meeting of 10/12/66)

The status of the proposed merger with ABC was reviewed by the Chairman and Mr. Brittenham reported on the significant testimony presented at the FCC hearings on September 19 and 20, 1966, with respect to the ITT-ABC merger, particularly the issue of the substantial autonomy of the new subsidiary and the commitment by ITT to furnish ABC financial resources approximating \$50 million over a three- to five-year period.

There would thus clearly seem to be "a reflection of the minutes" that the Board knew and approved the \$50 million commitment. This is hardly the basis for a finding of misrepresentation.

Appellant also alleges (Br. 118) that Goldenson inaccurately told the Commission in July and September, 1966 that ABC had known and planned capital requirements of \$90 million for new studios in New York and Los Angeles, basing its argument largely upon the fact that ABC had rejected a \$40 million plan for construction of New York facilities. But rejection of the particular plan which had been submitted to it by the Austin Company, did not indicate ABC's abandonment of the project, but merely that the plan was inadequate (R. 288-291; Tr. 2394-2396). Since the letter to the Commission of July 25, 1966 (R.-23, p. 3), which appellant relies upon, merely stated that approximately \$90 million would be needed as a part of a long-range plan for new studios in New York and Los Angeles, the Austin plan, although rejected, furnished a reasonable basis for an estimate. Goldenson

testified (Tr. 1532) that if they were going to invest \$40 million it would have to be on more than a five or 10 year basis, and with a better plan. The record contains much additional material concerning costs of future construction upon the basis of subsequent plans about which there is much dispute, but it is reasonably clear that the estimate given the Commission in the summer of 1966 was a best estimate upon the basis of then current thinking. Goldenson relied upon Siegel for the figure (Tr. 1536), and Siegel asked the construction and engineering departments for reasonable estimates. (Tr. 2388-2389.) Goldenson's use of the estimate raises no substantial candor issue.

Appellant next (p. 119) challenges Goldenson's good faith<sup>54</sup> in stating (Tr. 1619):

"As to the secondary affiliates we may get in at 12 o'clock midnight or one o'clock in the morning or Sunday afternoon or Saturday afternoon when 15 or 20 percent of the sets are in use as compared with 65 and 70 percent sets in use between 7:30 and 11:00.

Therefore, the 96½ to 97 percent coverage does not mean that that is the number of homes being covered because you don't have the sets in use at the time between 7:30 and 11:00. That is why the question has got to be amplified."

It is claimed that no clearances resulted in shifting programs to midnight or 1 A.M., except for a few clearances for feature films which began during prime time and ran into late nonprime hours. But Goldenson was giving examples; he also mentioned Saturday and Sunday afternoon clearances, and appellant does not question that they were involved or that many ABC program clearances

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<sup>54</sup> Appellant also here attacks Goldenson's estimate of the dollar loss due to smaller coverage by primary affiliates, but this estimate was based on a document prepared by someone else (Tr. 3438), and in essence appellant is merely arguing that a factor not taken into account in preparing the exhibit (i.e. program popularity) might vary its conclusion. This is not a candor matter.



were at times when audiences were low—the point Goldenson was making. Here again, a rather minor issue has been elevated to the status of a significant candor question with no showing that anything more than an error, if that, was involved.

Finally, appellant alleges (Br. 120) that Goldenson at the supplementary hearing raised serious consequences for ABC if the merger did not go through which he had not raised in the September, 1966 hearing, and sees this as a lack of candor because Goldenson's explanation was that he hadn't been asked at the first hearing. But the record shows that Goldenson first explained that he thought he had mentioned these consequences before, and that he said he hadn't been asked when so prompted by his counsel (Tr. 1695-1696). His additional statement in the supplementary hearing of his fears of the consequences if the merger were not approved does not raise a substantial candor question, whether or not the Commission agreed with them.

In sum, we believe that appellant has equated precision of language with candor. It also goes too far in suggesting that a failure by the agency to make a finding in accord with testimony automatically indicates that the testimony was given in bad faith. The Commission believed that only one of these specifications of misconduct even required specific treatment, and that none of them required an adverse finding. This determination is adequately supported by the record.

**CONCLUSION**

For the foregoing reasons, the Commission's decisions should be affirmed.

Respectfully submitted,

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*Washington, D. C. 20554*

October 2, 1967

**BRIEF FOR INTERVENOR  
ABC TELEVISION AFFILIATES ASSOCIATION**

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**United States Court of Appeals**

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 21147**

United States Court of Appeals  
for the District of Columbia Circuit

**FILED OCT 2 1967**

**UNITED STATES OF AMERICA,**

*Nathan J. Paulson*  
CLERK

*Appellant,*

**v.**

**FEDERAL COMMUNICATIONS COMMISSION,**

*Appellee,*

**INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,  
AMERICAN BROADCASTING COMPANIES, INC., and  
ABC TELEVISION AFFILIATES ASSOCIATION,**

*Intervenors.*

**On Appeal from the  
Federal Communications Commission**

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(i)

**STATEMENT OF QUESTIONS PRESENTED**

The ABC Television Affiliates Association, an intervenor herein, concurs in and adopts the "Statement of Questions Presented" as set forth in the brief of the Appellee, Federal Communications Commission.

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IN THE  
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UNITED STATES OF AMERICA,

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FEDERAL COMMUNICATIONS COMMISSION,

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*Intervenors.*

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On Appeal from the  
Federal Communications Commission

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**BRIEF FOR INTERVENOR**

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**PRELIMINARY STATEMENT**

The ABC Television Affiliates Association (hereinafter "the Affiliates" or "the Association") is a non-profit association of television broadcast stations affiliated with the ABC television



network in some 128 communities throughout the country. The Affiliates have intervened in the proceedings under review herein because of their firm conviction that the decision of the Federal Communications Commission approving the merger in question will serve the public interest by strengthening the American Broadcasting Company and, concomitantly, the position of each of its affiliates in the respective local markets.

The Affiliates concur in and adopt the "Counter-Statement of the Case" set forth in the brief of the Appellee, Federal Communications Commission. Further, the Affiliates are of the opinion that the argument presented by the Appellee correctly interprets the record below and correctly states and applies the controlling legal principles. Accordingly, and in the interest of limiting the appellate record, this brief will be restricted to those aspects of the record and decision below which bear upon the network-affiliate relationship in the field of television broadcasting.

#### SUMMARY OF ARGUMENT

ABC's access to the financial resources and technological capabilities of ITT will significantly strengthen the competitive position of the Affiliates throughout the country, enabling them to expand and improve both their network and locally originated programming, all of which will redound directly and substantially to the public interest. The record below fully supports this proposition and affords ample justification for the Commission's conclusion that ABC's access to

the financial resources and technological capabilities of ITT would substantially benefit the public interest.<sup>1</sup>

In addition, the evidence of record also clearly demonstrates that the merger will operate to the substantial benefit of UHF broadcasting, and the Commission was fully entitled to rely upon the representations of ABC and ITT in this regard. The accelerated development of UHF broadcasting which will result from the merger will serve directly to strengthen the ABC network and the Affiliates' structure, thus benefiting the public interest by reason of the increased and improved programming to result.

The evidence affords substantial support for the Commission's conclusion that the independence and integrity of the news and public affairs programming of the ABC television network will not be adversely affected by the proposed merger. The Appellant's argument (Argument IV) to the effect that the independence and integrity of ABC's news and public affairs programming will be impaired as a result of the merger is totally unsupported by the evidence and rests exclusively upon unfounded speculation and conjecture.

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<sup>1</sup> Our argument in this regard is addressed to Appellant's Argument I, wherein it is contended, in effect, that the Commission was required to find specific deficiencies in ABC's performance attributable to lack of funds and to find that such funds were not otherwise obtainable. The infirmity of this argument is clearly demonstrated in the brief of the Appellee, Federal Communications Commission. Further, the substantial public interest benefit to flow from the merger constitutes, in and of itself, adequate grounds for the Commission's decision.

## ARGUMENT

- I. THE COMMISSION'S CONCLUSION THAT THE PROPOSED MERGER WILL REDOUND TO THE PUBLIC INTEREST BY AFFORDING AEC ACCESS TO ITT'S FINANCIAL RESOURCES AND FURTHERING THE DEVELOPMENT OF UHF BROADCASTING IS CORRECT AND FULLY SUPPORTED BY THE RECORD.
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- A. The merger will significantly strengthen the competitive position of ABC and, concomitantly, the ABC television affiliates throughout the country, thus enabling the affiliates to expand and improve both their network and locally-originated programming.
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The nature and quality of television service and the extent to which the public interest is served thereby are, in large measure, determined by the joint efforts of the television networks and their primary affiliates.

The essence of a "primary" affiliation agreement between a national television network and a local television station is the right of the affiliated station to carry the network's programs in the community in which the station is located. Although the affiliated station is not obliged to carry the programs offered by the network, it is assured the right of first refusal as to such programs in all instances.

Such agreements also provide for the compensation to be paid by the network to the affiliated station in consideration for the station's carriage of the network's programs. The compensation is normally a function of the audience the station is able to deliver — the "delivered" audience being the ultimate commodity purchased by national advertisers from the network.

As a practical matter, primary affiliation agreements generally result in a continuing relationship between the network and the affiliated station. The essential advantage of such affiliations to the network is

the fact that primary affiliates carry a significant percentage of the programs offered by the network, such programming forming the basis or core of the stations' operations. Similarly, a primary network affiliation assures the local station of a constant source of high quality programming, revenue from the network, and revenue from the station's sale of national spot and local advertising adjacent to its network program fare.

In most cases where a network is unable to obtain a primary affiliation agreement with a station in a given community, it is then relegated to what is termed a "secondary" affiliation arrangement in its attempt to have its programs carried in the community in question.<sup>2</sup> These arrangements lack the continuity and relative permanence of primary affiliations and provide only for the payment by the network of an agreed amount when and if the secondary affiliate chooses to carry a given network program. The significant practical distinction is that secondary affiliates normally carry an appreciably smaller percentage of the network offerings than do the network's primary affiliates. This result is implicit in the fact that the secondary affiliate does not rely upon the network programs as a basic program source, but merely picks and chooses the programs it desires to carry at any given time. Because of the *ad hoc* nature of the network's arrangements with its secondary affiliates, comparatively less opportunity is afforded for the promotion, advertising and sale of network programs carried by such affiliates.

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<sup>2</sup> This situation most commonly arises in communities having only two television outlets. It also obtains, however, in a number of communities having three outlets but where the third station is so limited in its ability to deliver a competitive audience that a primary affiliation is not economically possible for the network. ABC is peculiarly confronted with this situation in a number of markets (see pp. 6-7, *infra*).

Thus, the network and the primary affiliates are engaged in a co-operative venture in which the network regularly makes available program fare, and such affiliates regularly make available the local outlets for distribution of such program material. The success of this joint venture and, in turn, the quality of service which is rendered to the viewing public is a function of the strength of the network and its affiliates.

The record in this proceeding establishes that the ABC television network and its affiliates have historically ranked third as compared with the NBC and CBS networks and their respective affiliates. This ranking results, in large measure, from the fact that the ABC television network entered the field of television network broadcasting well after the commencement of such operations by the other networks. As a consequence, in the competition for affiliates ABC was unable to acquire a local outlet in many markets and, in other markets, was relegated to the weakest stations. Whereas ABC has a total of 137 primary television affiliates, NBC and CBS have such an affiliation with 206 and 192 stations, respectively (AR 30, R. 407).<sup>3</sup> As a result, ABC reaches some 3 million fewer viewers through primary affiliates than do NBC and CBS.<sup>4</sup> Thus, it is apparent that a significant portion of the viewing public is denied ABC

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<sup>3</sup> Record references herein are keyed to the Commission's Index of Record. Transcript references will be cited "Tr. \_\_\_\_\_"; Documents filed prior to April 27, 1967, will be cited "R-1" through "R-105"; Documents filed subsequent to April 27, 1967, will be cited "R. \_\_\_\_\_". Reference to Appellant's brief will appear as "Br. \_\_\_\_\_".

<sup>4</sup> Whereas ABC affiliated stations cover a total of 50,200,000 TV homes, NBC and CBS affiliates cover 53,300,000 and 53,400,000 TV homes, respectively. Ibid. In view of the highly competitive nature of the television broadcasting business where, for example, a small fraction of an audience rating point determines the placement of an advertiser's account, these differences take on added importance.

programming on a regularly scheduled basis.<sup>5</sup> ABC is able to offer national advertisers fewer assured markets than the competing networks. The affiliates of ABC generally operate with less desirable facilities and, therefore, deliver fewer viewers than its local competitors. As a necessary corollary, a lower rate is paid to the ABC television affiliates for carrying ABC programs.<sup>6</sup> Thus, the ABC network, its television affiliates and a significant part of the viewing public are adversely affected by the fact of ABC's fewer number of primary television affiliates and the disparity of coverage between ABC's affiliates and the coverage of the affiliates of the dominant networks.

It is also clear that the ABC television affiliates and the viewing public are denied the full range of competitive programming throughout the broadcast day which NBC and CBS are able to offer by reason of their greater facilities and resources. A prime example of this disparity is seen in the fact that ABC offers no regular television programming during the period from morning sign-on to 10:00 A.M. Further, during the two-month period, January-February, 1967, ABC was accorded only a 13.3% share of the total network revenues for the period from 11:00 P.M. to sign-off. Although during the January-February

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<sup>5</sup> ABC is able to reach a portion of such viewers (frequently on a delayed basis) by means of secondary affiliation arrangements and ad hoc clearances. These methods are relatively undesirable, however, both in terms of the network's interest (Tr. 3386-89; 3394-96) and the certainty of viewing times for the public. In the 36 two-channel markets where ABC does not have a primary affiliate, only 62% of ABC's prime time programs is carried at the scheduled network time, compared to 92% for NBC and 89% for CBS (AR 74, R. 1450).

<sup>6</sup> The comparative hourly rates charged by the networks for winter, 1966 were: NBC, \$151,995; CBS, \$151,645; ABC, \$117,380, an average difference of approximately \$34,000 per hour between ABC and its competitors (Application, Ex. 1-3; R. 1).



period ABC had 31% of network revenues in the prime time evening hours, its share fell to 22.1% in the weekly 10:00 A.M. to 6:00 P.M. period, and 18.4% in the Monday-Saturday 6:00-7:30 P.M. (news) period (AR 41, Att. 3; R. 840). Thus, other than for the prime time hours, it is clear that ABC has been unable to approach the performance of NBC and CBS in terms of program availabilities and attractiveness. The lag in ABC programming is keenly felt in the areas of news and public affairs (Tr. 113), programming activities of substantial public interest and value and which most frequently do not produce significant revenues. By reason of its relatively limited resources, ABC has been unable to effectively compete with the dominant networks in these areas.

That ABC's television affiliates bear the vicarious detriment of such a situation is axiomatic. It is equally certain that the overwhelming dominance of NBC and CBS throughout most of the average broadcast day is incompatible with the concept of a fully competitive network system. Such a gross imbalance of years' standing necessarily operates to deny to the viewing public the broad range of quality programming which a fully competitive network system should produce.

The foregoing demonstrates that the ABC television network is now, and has been for a number of years, in a significantly inferior position in terms of overall program availabilities and the non-competitive status of its programming in other than prime viewing hours. The record supports and confirms the Commission's finding upon its initial consideration of the matter that, other than for its greater number of radio affiliates,

"In every other respect, ABC lags behind the other major networks. In relation to NBC and CBS, ABC has fewer television affiliates, a smaller share of the audience for both radio and television, less revenue from both radio and television, less profit and smaller assets. During the last three years



the ABC television network has operated at a loss, while the other two major networks have had substantial and increasing profits. Program expenses have been increasing rapidly during recent years, and have increased more rapidly than revenue for ABC. The cost of providing news and public affairs programs has increased more rapidly than the cost of other network programs presented by ABC" (R. 57, para. 23).

These same factors have, of necessity, operated to the competitive detriment of the ABC television affiliates by limiting their ability and/or making it relatively difficult and costly to offer a full range of high quality programming, particularly in the areas of news and public affairs. The ability of such an affiliate to develop and/or expand its own public service programming is necessarily retarded by reason of the less attractive nature and relatively limited quantity of its basic network programming. The primary affiliates of the ABC television network rely in substantial part upon revenues received from the network and revenues derived from the sale of time adjacent to network programs. Just as ABC's network revenues are less than those of its competitors, so, too, the return to ABC's affiliates is, in most instances, less than the local NBC and CBS affiliates, with which they must compete. Thus, the inferior competitive position of the ABC television network is directly reflected in the competitive inferiority of its affiliates throughout the nation.

We are concerned here not only with the position of the ABC television network *vis-a-vis* its network competitors, but also, and perhaps more vitally, with the question of meaningful and beneficial competition among local television stations in hundreds of communities throughout the country. The strengthening of ABC through the merger will improve the competitive position of its television affiliates and redound directly to the public interest by expanding the capability of such affiliates to increase and improve their local public service programming, including

such endeavors as local newscasts; live coverage of significant local events; discussion/panel programs; station editorials; and the presentation of public controversial issues.

As observed at the outset, it is at the "local" level that ABC's predicament may be finally assessed in terms of its effect on the public interest. It is at that level which ABC's television affiliates operate, and it was in light of the experience of the Affiliates in such operations that they supported the merger of ABC and ITT.<sup>7</sup>

The evidence reflects that ABC plans to increase its budget for news and public affairs programming to \$40,000,000 in 1968 (from \$26,000,000 in 1966) (Tr. 113, 1659). Similarly, the 1968 budget for sports coverage will increase from \$24,000,000 in 1967 to \$38,000,000 in 1968 (Tr. 265). In addition, the acquisition of rights to fully competitive, prime time films will require substantially higher expenditures

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<sup>7</sup> The Association formally announced its support of the merger in the following communication to the ABC television network, the same appearing in the record at Tr. 92-93:

"We understand that the Federal Communications Commission is holding an oral hearing on September 19, 1966, to consider whether the ABC-ITT merger is in the public interest. The Board of Governors of the ABC-TV Affiliates Association unanimously supports the merger.

"In our opinion, the financial and technical resources of the new company will greatly strengthen the ABC-TV network. We understand that the added resources will be used to speed conversion to color; to expand the news, sports, special events and public affairs programming; to build the projected major new studio complexes in New York and Los Angeles; and to finance new program innovations, all of which should result in better overall ABC-TV network program service.

"This will result in strengthening the position of each ABC affiliate in its local market, enabling them to attract new audiences and improve their own local service to the public."

in the years to come (Tr. 266). Such resources will be available as an incident of the merger in question.<sup>8</sup> As the Commission correctly observed,

" . . . [I]t is clear that ABC, which as the 'third network' lags behind its two competitors, will be significantly aided by having ITT's financial strength back of it, in such matters as its attempts at cultural programming innovation, news and public affairs expansion, ability to chance more or sooner primary affiliation with UHF stations" (R. 5320).

- B. The record supports the Commission's finding that the merger will benefit UHF development and the Commission was entitled to rely upon the commitments of ABC and ITT in that regard.

Among the three networks, ABC has borne the brunt of the failure of UHF television to develop into a fully competitive television service (Tr. 229, 3402, 3425-30). The ABC network continues to bear that burden, as does its television affiliates. ABC presently has more primary UHF affiliates than either NBC or CBS (17, 14 and 13, respectively).<sup>9</sup> Of greater significance, however, is the fact that in a substantial number of markets, ABC has been forced to seek secondary affiliations with one

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<sup>8</sup> On the other hand, should ABC be unable to acquire substantial, additional financial resources, it faces the judgment of whether it will be able to continue its present level of programming. By reason of its long-standing inferior position and relatively limited resources, ABC is unable to run the risks attending substantial news and public affairs programming to the same extent as its more affluent competitors (Tr. 225-227, 232).

<sup>9</sup> Given the substantially fewer number of primary ABC affiliates, which include UHF affiliates (137 versus 206 and 192 for NBC and CBS, respectively), the disparity is compounded.

of the two VHF stations rather than a primary affiliation with a UHF station in such markets. These arrangements have been necessitated, in part, by the more limited area coverage attainable by UHF stations generally, as well as the relative paucity of UHF equipped television receivers in most such markets.<sup>10</sup> The immediate result in such cases has been significantly fewer program clearances for ABC.<sup>11</sup> The ultimate consequence is that the viewing public is again denied a balanced network fare throughout a substantial part of the broadcast day.

The record below leaves no question that one of ABC's major competitive problems is viewer access, and that this problem arises, in large part, from the presently non-competitive status of UHF television. It is therefore apparent that the ABC network and those television stations affiliated with it have a substantial and continuing interest in technological developments which could provide more effective UHF coverage.<sup>12</sup>

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<sup>10</sup> As the Commission observed:

"For example, the immediate problem of ABC with respect to audience coverage arises in substantial part from the fact that there are a number of markets (18 out of the top 100, plus many more in the smaller markets) in which there are only two VHF stations. As the older and stronger networks, NBC and CBS have a substantial advantage over ABC, both in station affiliations and in clearance of programs in markets with two dominant stations. The spectrum allocation is such that it is not possible to assign additional VHF channels to these markets" (R. 5305).

<sup>11</sup> In the 36 markets where ABC does not have a primary television affiliate, it clears 82 hours of daytime and news programming, compared to the 194 hours and 201-1/2 hours cleared by NBC and CBS, respectively, in the same markets (AR 74, R. 1438).

<sup>12</sup> Tr. 92, 107-9, 111, 227, 274-7, 316, 2749, 3051-3.

It is also apparent that the merger will operate to further and accelerate the development of UHF television, a matter in which ABC, its television affiliates and the public have a significant interest.<sup>13</sup> That the public has an equivalent interest in such development readily appears from the fact of its substantial financial investment in UHF over the past few years. This compulsory investment was occasioned by the passage of the "All-Channel" receiver legislation in July, 1962,<sup>14</sup> the significant effect of which was to require that all television receivers sold after April 31, 1964, be equipped to receive UHF signals. The additional manufacturing costs involved have, of course, been passed on to the public and, in light of the millions of television sets sold since

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<sup>13</sup> It is clear that ITT would also be vitally interested in UHF development by reason of the expanded ABC coverage which would result from such development. Moreover, the Commission found that among "some very specific promises and proposals" were the following projects which ITT can undertake "to help solve the problem of UHF and of ABC coverage":

- "(a) The substitution of high power solid state devices for the present transmitting systems;
- "(b) The design of cheaper and more efficient very wide band receiving antennas which will operate over the whole VHF/UHF spectrum;
- "(c) The improvement of UHF coverage by the application of technical know-how to transmitter site selection;
- "(d) The improvement of technology to fill in UHF shadow areas and to provide improved UHF translators;
- "(e) Automation of transmitting equipment to help reduce UHF transmission costs and thus help to equalize it economically with VHF;
- "(f) The development of a new type of foam dielectric cable which will reduce the transmission loss over the whole UHF band down to the levels of the VHF band;
- "(g) The development of a complete set of components which will provide television receivers with electronic tuning and give identical performance for all VHF and UHF stations, with push button tuning for all stations" (R. 5305-5306).

<sup>14</sup> Pub. L. 87-529, 76 Stat. 151, 47 U.S.C. §303(s) (1962).

April, 1964,<sup>15</sup> it is clear that the public's direct investment in UHF television is substantial.

The "All-Channel" legislation, of course, was an expression of the Congress' concern with, and dedication to, the development of UHF television. With additional UHF sets in the homes, the more numerous UHF affiliates of ABC, strengthened by the additional resources of the merger, will have the opportunity to produce attractive programs in all segments of the day, and thus compete for the larger audience of the CBS and NBC affiliates. Moreover, ABC will be in a position to abandon secondary affiliations with VHF stations and develop its programs with UHF stations as primary affiliates. Thus, on a short-range basis, the development of UHF will be benefitted and, in the long term, the ABC-TV network will be afforded the means of eliminating the existing competitive disparity. Accordingly, the enhancement of UHF broadcasting to result from the proposed merger is not only consistent with the public interest, but wholly responsive to Congressional intent.

In contesting the Commission's findings of benefit flowing from approval of the merger, the Appellant seeks to impose a decisional standard entailing a degree of finality and precision which, given the nature of the case, is neither practically attainable nor legally required. It must be recognized that this case compels the exercise of the Commission's discretion and informed judgment in attempting to determine the future public interest ramifications of the merger. Indeed, the case falls squarely within this Court's observation that,

"... When a regulatory action contemplates a proposed development, new, not existing, a type of judgment is required which is wholly absent from the mere evaluation of past facts to ascertain a

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<sup>15</sup> 7,234,125 television sets were sold during the year 1966. Television Digest, Vol. 7, No. 38, September 18, 1967.



present or past fact. It is in the exercise of that sort of judgment that the much discussed expertise of administrative agencies finds its greatest value. Here is the field of uncertainties, imponderables and estimates. This is where the rule that a conclusion within the realm of rational deduction or inference stands despite differences of opinion, has its greatest applicability." *American Airlines v. Civil Aeronautics Board*, 89 U. S. App. D. C. 365, 368, 192 F.2d 417, 420 (1951).<sup>16</sup>

The Commission's decision approving the merger and denying Appellant's petition for reconsideration unquestionably constitutes "a conclusion within the realm of rational deduction or inference" and, as such, should be affirmed. It is fundamental, of course, that the disposition of such matters is generally to be left to the regulatory agency, *United States v. Storer Broadcasting Co.*, 351 U. S. 192 (1956); *Johnston Broadcasting Co. v. F.C.C.*, 85 U. S. App. D. C. 40, 175 F.2d 351 (1949), and that the courts will not intervene less some "prejudicial departure from the requirements of the law or abuse of the Commission's discretion . . . ." *United States v. Pierce Auto Freight Lines*, 327 U. S. 515, 536 (1945); *National Broadcasting Co. v. United States*, 319 U. S. 190, 224 (1943); *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 145-146 (1939).

The Appellant has clearly failed to demonstrate that the Commission's conclusions regarding benefits flowing from the merger are not adequately supported in the record, or that such determinations entail an abuse of the Commission's discretion. Significantly, Appellant appears, on the one hand, to urge novel decisional standards having no foundation in law and, on the other, to fault the Commission for assertedly not having adhered to such standards. Thus, Appellant argues that

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<sup>16</sup> See also, *Consolo v. Federal Maritime Board*, 383 U. S. 607 (1966).



the Commission was required to find deficiencies in ABC's performance detrimental to the public interest, which are attributable to a lack of funds, and to find further that such funds are unavailable other than by means of merger (Br. 25, *et seq.*). Similarly, Appellant contends that the Commission's conclusion that the merger would benefit UHF development was a product of assertedly vague and uncertain conditions imposed by the Commission itself (Br. 39, *et seq.*).

As noted, however, the precision and finality sought by the Appellant is neither required nor attainable. The Commission is clearly "not required to grant authorizations only if there is a demonstration of facts indicating immediate benefit to the public." *Federal Communications Commission v. RCA Communications, Inc.*, 346 U. S. 86, 96 (1953). Rather, in deciding the case below, the Commission was entitled, indeed required, to rely "upon its own judgment in the matter, educated by experience and supported by consonant findings." *RCA Communications, Inc. v. F.C.C.*, 99 U. S. App. D. C. 163, 165, 238 F.2d 24, 26 (1956), *cert. den.*, 352 U. S. 1004. As to the ultimate public benefit flowing from the merger — and ABC's access to the financial resources of ITT — the Commission need only "warrant, as it were, that competition would serve some beneficial purpose such as maintaining good service and improving it." *Federal Communications Commission v. RCA Communications, Inc.*, 346 U. S. at 97.

II. THE COMMISSION'S CONCLUSION THAT THE INDEPENDENCE AND INTEGRITY OF ABC IN THE FIELDS OF NEWS AND PUBLIC AFFAIRS PROGRAMMING WILL NOT BE ADVERSELY AFFECTED BY THE MERGER IS CORRECT AND FULLY SUPPORTED BY THE RECORD.

The continuing independence and integrity of ABC's news and public affairs programming is of vital concern to the ABC Television Affiliates Association. Each of its members is a licensee of the

Federal Communications Commission, and each is independently responsible for the programs broadcast over its facilities. This is so, regardless of the source of such programs.

The Affiliates, therefore, have an overriding interest in ABC's news and public affairs programming — both from a pragmatic, competitive viewpoint, as well as in their status as licensees of the Commission. Moreover, the fact that professional newsmen of unquestioned journalistic integrity are represented among ABC's television affiliates is an additional deterrent to any possible and speculative conditioning of ABC news and public affairs programming.<sup>17</sup> Thus, the journalistic integrity which the Commission found to be "another potent force to maintain ABC news autonomy and integrity" (R. 5325) is seen to permeate the system from network production to ultimate broadcast throughout the nation.

In the face of this known independence of the Affiliates, Appellant nevertheless argues that the Commission erred in finding no detriment from an alleged possible impairment of ABC's independence and integrity in the area of news and public affairs (Br. 100, *et seq.*). The

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<sup>17</sup> Although newspaper interests owning or affiliated with ABC's primary television affiliated stations are not as many as those associated with CBS and NBC, they do include:

Scripps-Howard Newspapers (Cleveland Press, WEWS, Cleveland);  
Triangle Publications (Philadelphia Inquirer, WFIL-TV, Philadelphia);  
Newhouse Newspapers (St. Louis Globe-Democrat, KTVI, St. Louis);  
Washington Evening Star, WMAL-TV, Washington, D. C.;  
Akron Beacon Journal, WAKR-TV, Akron, Ohio;  
Anderson Independent and Mail, WAIM-TV, Anderson, S. Car.;  
Cedar Rapids Gazette, KCRG-TV, Cedar Rapids, Iowa;  
Elkhart Truth, WSJV, South Bend, Indiana;  
Harrisburg Patriot and News, WTPA, Harrisburg, Pa.;  
Holyoke Transcript-Telegram, WHYN-TV, Holyoke, Mass.;  
Omaha World-Herald, KETV, Omaha, Nebr.;  
Dallas Morning News, WFAA-TV, Dallas, Texas. (Television Factbook, 1967 Ed., pp. 115-a, *et seq.*)

thrust of Appellant's argument is the claim that "In the light of the nature of ITT's foreign interests, it is apparent that its ownership of a major news medium would give rise to serious conflicts of interest not comparable to other licensees" (Br. 104). Appellant also rejects the positive record assurances of ITT that the ABC news function will remain independent (Br. 106), and points to an asserted attempt by ITT to influence news coverage of the evidentiary hearing below (Br. 109). Essentially upon these points, Appellant rests its conclusion that "the merger threatens to impair the integrity and independence of ABC's news and public affairs activities" (Br. 113).

Appellant's presumption of "impairment" is unfounded and without support in the record, and the argument that the Commission erred in finding no detriment from such "impairment" is without foundation or merit. Indeed, Appellant's position appears to be premised exclusively upon its visceral judgment that ITT's foreign interests are *ipso facto* incompatible with the maintenance of an independent ABC news and public affairs operation.<sup>18</sup> However, the evidence in the case fully supports the Commission's finding that "the integrity and independence of ABC's activities in the news, information, and public affairs field will be maintained after the merger" (R. 5326).

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<sup>18</sup> In its decision of December 21, 1966, the Commission pertinently observed that "It does not seem appropriate in this case for us to go far beyond the statute to establish some very strict but vague rule against 'foreign interests' (which would surely disqualify a number of major broadcast licensees)" (R. 57, para. 36).

It is apparent from the decisions below that the Commission gave careful consideration to the question of what impact, if any, the merger may have upon the integrity and autonomy of ABC's television news and public affairs activities. It is further apparent that the Commission considered the question with a thoroughness commensurate with its possible decisional significance. That the Commission's decision in this regard rests upon an exhaustive analysis and is fully supported by the facts of record readily appears from the following statement in its decision upon reconsideration:

"The Commission Decision [of December 21, 1966] considered the independence of ABC news and public affairs functions as one of the principal issues, devoted a substantial part of the opinion to an analysis of the issue in detail, and concluded from the Commission's experience with similarly situated enterprises in the industry, the past performance of both applicants as long time licensees of the Commission, the autonomy of ABC News within the ABC organization, the proposed autonomy of ABC within the ITT organization, and the solemn assurances of the principals, that the merger should be approved" (R. 5324).

Upon reconsideration, Appellant was accorded a full opportunity to demonstrate that the Commission had erred in its initial conclusions. As the Commission correctly observed, however,

"[Those] conclusions are strengthened and reinforced by further consideration in the light of the supplementary record. Despite the most wide ranging inquiry and examination of this issue no evidence was offered tending to show that ITT would, in the event of the merger, attempt to impose its position on ABC or influence the journalistic functions of ABC" (R. 5325).

Indeed, the record reflects *no* evidence supporting the Appellant's position.<sup>19</sup> As noted, *supra*, its argument is based exclusively upon speculation and disbelief, wholly inadequate grounds upon which to contest the informed judgment of the agency within whose special province the matter falls. On the other hand, the Commission's judgment was based upon positive, tangible assurances of continuing integrity, among them being a written Policy Statement of ITT, dated November 1, 1966, unequivocally directing that the ABC news operation would remain autonomous.<sup>20</sup> Moreover, the testimony of the leading principals of ABC and ITT reflected their total commitment that the integrity of the ABC news operation would be strictly maintained (Tr. 242, 531). The evidence also showed that the ABC news division itself would continue to operate autonomously within ABC (Application, Ex. 1-3; R. 1).

An additional factor relied upon by the Commission was the "widely-recognized independence and integrity of responsible professional journalists" (R. 5325). Such independence was epitomized by the testimony of the President of ABC News to the effect that any attempt by ITT to influence ABC news policy would produce mass resignations by members of the news staff and that he, himself, would resign were he told what to broadcast or not broadcast (Tr. 3301-02). Further, the President of ABC testified,

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<sup>19</sup> Appellant offered no testimony in support of the claim of possible impairment of the integrity of ABC's news and public affairs programming, which might result from the merger.

<sup>20</sup> The ITT Policy Statement included the following directive: "The independence of ABC programming from any other ITT commercial or other similar interest shall be inviolate. No officer, employee, or agent of any ITT System company or group shall take any action or make any attempts to influence in any way whatsoever in the news, special events, entertainment, or other programming of the ABC network or stations for the purpose of attempting to further, or to avoid conflict with, the commercial or other interests of an ITT System company or group" (AR 4, R. 195).

"[I]f our news department were to operate on any other basis than a purely objective basis in competition with NBC and CBS where they are also operated on an objective basis we would suffer competitively in the eyes of the public and in the entire eye of the news field" (Tr. 285).

Appellant has failed to perceive the decisional significance of journalistic integrity and the high sense of independence and responsibility traditionally associated with the broadcast news function at all levels.<sup>21</sup> The concept is of additional significance here in that ABC must rely upon the facilities of some 137 primary television affiliates in order to reach some 50,200,000 TV homes throughout the nation. As noted, *supra*, each of these affiliates is an independent licensee of the Commission and each is independently responsible for assuring the objectivity of programming held out to the public as news or public affairs reporting. Moreover, just as the ABC network would "suffer competitively" *vis-a-vis* NBC and CBS should its programming not comport with the highest standards of journalism, the network's television affiliates would bear a commensurate competitive detriment on the local level.

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<sup>21</sup> As the Commission noted: "The area of broadcast reporting of news and public affairs is a field in which the Commission has experience and special competence and in which the Department has no special qualifications" (R. 5324).



## CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of the Appellee, Federal Communications Commission, this Court should affirm the Commission's order granting the applications of ABC for the assignment and transfer to ITT of the broadcast licenses in question.

Respectfully submitted,

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ABC TELEVISION AFFILIATES  
ASSOCIATION

October 2, 1967





REPLY BRIEF FOR APPELLANT

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21147

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UNITED STATES OF AMERICA, APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE  
INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION,  
AMERICAN BROADCASTING COMPANIES, INC., AND ABC  
TELEVISION AFFILIATES ASSOCIATION, INTERVENORS

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On Appeal from the Federal Communications Commission

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United States Court of Appeals  
for the District of Columbia Circuit

FILED OCT 13 1967

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On Appeal from the Federal Communications Commission

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REPLY BRIEF FOR APPELLANT

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The Department's principal brief in this case has  
largely anticipated and dealt with the responsive

arguments of the Commission, and of the merging companies. A few points, however, require reply. Further, it is significant that the parties have abandoned or failed to defend important aspects of the decision below; and, indeed, have sought to advance findings and conclusions not made by the Commission majority as a basis for sustaining that decision. The Commission's opinion may be upheld solely on "the grounds invoked by the agency." SEC v. Chenery Corp., 332 U.S. 194, 196; 318 U.S. 80, 94-95. If plainly material findings are reversed or set aside, the case must be remanded. And we "may not accept appellate counsel's post hoc rationalizations for agency action" (Burlington Truck Lines v. United States, 371 U.S. 156, 168).

1. ABC's Financial Need

In their briefs, both the Commission and the companies object to our statement that ABC's market share

has over recent years varied within only a few percentage points of its current position; and a new finding is proposed that ABC's relative position "has deteriorated" during this period (FCC Br. 20, ITT-ABC Br. 68). The Commission majority made no such finding of steady decline, because it is not true. The fact is that ABC's market share dropped for a few years, but since 1964 its growth has exceeded that of its competitors (38% as compared to 23%), and its relative market position has been steadily on the rise. While the market position has varied, as we said, ABC's revenues have grown steadily, more than doubling from 1959 to 1966 (BB.1, R. 4319; J271, J272, R. 3552-3).

The companies modestly acknowledge (p. 71) that ABC has achieved "some measure of success". The fact is, as the president of the network testified, that ABC has become fully competitive (Tr. 3314-5). The mere fact that its competitors earn unusually large profits does not provide a basis for a finding of competitive disadvantage in ABC's substantial profits. ABC's past successes

and excellent prospects were proudly and publicly proclaimed by ABC in the past (e.g., J270, p. 2, R. 3532; J269, p.3, R. 3506; J225, R. 2493); were recognized by experts in the financial community; and were the very basis for ITT's interest in this merger. Only in the course of developing evidence in this proceeding did ABC's plight become a matter for such concern to the parties.

As we have noted, the supplementary proceeding addressed in great detail the companies' claim that certain definite and very large capital expenditures were required within the next few years, which was the chief basis for the alleged financial need, and the Commission majority declined to resolve this issue. The companies have seized upon the opinion's reference to the parties' "responsible business judgments" to defend the entire vast scale of expenditures set forth in their exhibits as requirements "that must be met if [ABC] is to continue to meet its public service obligations" (ITT-ABC Br. 72-75). But the Commission's position before this Court is more candid. Its brief refers only to the evidence



that the other networks have more modern facilities and that there have been substantial costs for colorization (FCC Br. 23), 1/ and does not suggest any Commission acceptance of the alleged ABC future plans as a basis for financial need. The fact is there was no such acceptance, and the companies' efforts to supplement the opinion below with new findings and conclusions must be rejected.

Similarly, in dealing with the effect of ABC's smaller number of primary affiliates than its competitors, the Commission did not accept the companies' proposed findings and now asserts only that secondary affiliations involve some "disadvantages" (FCC Br. 21-22). The companies nevertheless seek to rely upon statistical exhibits

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1/ For the costs of colorization, the Commission's brief, (p. 23) cites only the testimony by an ABC official as to his estimate in 1965 (Tr. 2209-10). At the present time, the evidence shows that colorization of ABC facilities could be completed for an additional \$15 million, apart from funds already committed to be spent this year. See Department's Proposed Finding 6.43; see also Proposed Findings 6.34 - 6.42.

which were shown to be without probative value 2/ and assert that coverage presents "a substantial competitive inequality between ABC and the other two networks which will continue to operate as an obstacle to ABC's efforts to provide a superior public service" (ITT-ABC Br. 69). There is no such Commission finding; nor is there any finding that ABC access to ITT's financial resources will change the coverage situation. Since the companies (Br. 70) emphasize ABC's daytime performance as an index of the coverage problem (ABC is fully competitive in prime-time audience and revenues), it is noteworthy that ABC's rapid growth in recent years was also experienced

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2/ The alleged smaller revenue per minute received by ABC (ITT-ABC Br. 70) does not deal with actual transactions or reflect differences in coverage. AR63, Att. A, R. 1273, is an abstract computation utilizing average audiences and costs per thousand. It does not bear realistic relevance to actual revenues and audiences which differ for the various networks in different time segments, and depend upon program popularity (see following note). The computation used in AR63 would show that ABC's revenue deficiency would get worse if it sold more advertising, and that CBS is suffering from a deficiency vis-a-vis NBC, both absurd conclusions. See Department's Proposed Finding 6.19.

The ABC Affiliates Association (Brief p. 7) cite the alleged difference in the networks' hourly rates as showing ABC's problem. The figures cited are not actual rates, but represent the published time cards. As brought out at the

in the daytime segment. Recently-published trade figures show that from 1964 to 1966, ABC more than doubled its daytime revenues, and it moved from about 17% to 26% of the combined daytime revenues of the three networks, while NBC (without any coverage problem) dropped to about 28%. 3/ This supports the testimony at the hearing that ABC's weaker showing in daytime was chiefly attributable to the fact that it had only relatively recently concentrated attention upon this programming segment (see our main brief, p. 4).

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(footnote 2 continued)  
supplementary hearing, the great preponderance of sales are in participation minutes, combining time and program charges according to the specific audience anticipated, and the published rates are not commercially significant (Tr. 744-6, 3031-3; see Hearings on Possible Discriminations in TV Advertising before Subcommittee on Antitrust and Monopoly of Senate Judiciary Committee, 89th Cong., 2d Sess., p. 637).

Actual sales prices in prime time last season, for example, are shown in J272, R. 3554-7. To take one example, ABC was able to sell a minute on Thursday, 8-8:30 for \$45,000, as compared to CBS' \$29,000 and NBC's \$39,000.

3/ Broadcasting, September 4, 1967, p. 33. The disparity between CBS and NBC in daytime emphasizes the lack of reality in the Commission's comparison of ABC performance with the average of CBS and NBC. As the record shows, the three networks are about equal in prime time; CBS is far in the lead in daytime; NBC is dominant in early morning and in late night although this spring ABC (but not CBS) initiated a competitive late night show. See testimony of Mr. Seigel, ABC's executive vice president and of Dr. Goldin, Tr. 2350-5, 3045-7, 3080.

The Commission in effect concedes that specific need for, and benefits from, ITT finances cannot be shown; it argues that specific benefits are not required, and seeks to rely upon FCC v. RCA Communications, Inc., 346 U.S. 86, 96-97 (FCC Br. 18-19, 25-26). But that decision is quite inapposite. The Supreme Court there was considering the potential benefit from the enhancement of competition by the licensing of the entry of a new firm into the common carrier market. It is indeed true, as the Court said, that "the possible benefits of competition [from such new entry] do not lend themselves to detailed forecast" and may be grounded on the expectation generally of lower prices, greater efficiency, introduction of new services, etc., from a more competitive market (346 U.S. at 196). An entirely different situation is presented when the effect of a transaction is simply the merger of an existing highly successful firm with a larger company. In these circumstances, an enhancement of competition cannot be generally assumed or anticipated. Significantly, the ITT board approved this merger with the expectation that ITT would be able to take \$100 million in cash out of ABC

within a few years (J238, p.3, R. 3045). In the absence of findings that there are deficiencies attributable to ABC's lack of funds, and that ABC is unable to obtain funds on practical terms elsewhere, the conclusion that there is a substantial public benefit from access to ITT's financial resources is without basis. 4/

## 2. UHF Development

In our main brief, we urged that the Commission erred in failing to resolve a critical issue presented by the supplementary hearing, whether the development of a fully-competitive UHF was consistent with the interests of a merged ITT-ABC. Commission counsel and the companies respond by supplying a finding to resolve that issue.

Thus, the Commission now states "the enhancement of ABC's

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4/ The companies suggest that the Commission should not examine ABC's alternative sources of financing on the ground that Section 310(b) of the Communications Act bars it from considering whether a transfer to someone other than ITT might serve the public interest (ITT-ABC Br. 79-80). But Congress intended only to prevent use of a proposed transfer as a means of opening up broadcast properties to competing bidders. Here, the justification for the transfer is a claimed need for ITT financial resources. ABC's alternatives as an independent company for satisfying its requirements must be assessed in order to determine whether the need exists.

competitive position as a television network rests substantially with the fuller development of UHF" (FCC Br. 29). The companies echo this statement by asserting that "UHF development . . . is essential to [ABC's] growth"; they go on to state that "the Commission rejected" the "defeatist psychology" advanced by the Department as to the companies' long-term interests and that "it concluded" to the contrary (ITT-ABC Br. 86-87). It is precisely the absence of the findings now tendered by appellate counsel which we urge as a defect in the decision below. 5/

As to the conditions imposed by the Commission that the parties live up to commitments to work in UHF technology

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5/ The companies (Brief, p. 88) urge that ABC's interest in UHF is exemplified by its support of the all-channel receiver legislation. The fact is that all three networks supported that legislation. No effort is made in the companies' brief to refute our showing that ABC did not request assistance in UHF technology from ITT, and the other evidence of ABC's long-term interests in conflict with UHF development.

The Commission's brief (p. 30) refers to ITT work "in process" in UHF. This was work coincidentally in process in ITT's European subsidiaries, and it had no relation to the merger. Furthermore, contrary to the Commission's brief (p. 31), the ABC commitment to affiliate with UHF stations in a certain number of markets was only volunteered in the course of interrogation by the Commission during the course of the final argument below. The earlier statements cited in the record concerned only the ability of ABC to take such action if it had more money.

and to affiliate with UHF stations, neither Commission counsel nor the companies defend these conditions as embodying any measurable standards by which the future efforts of ITT-ABC can be appraised. The parties contend that the future efforts of the companies are by their nature not susceptible to setting "specific goals or achievements" (FCC Br. 33-35; ITT-ABC Br. 92-93). And they cite American Airlines, Inc. v. C.A.B., 98 U.S. App. D.C. 348, 235 F. 2d 845, certiorari denied 353 U.S. 905, for this Court's acceptance of an agency's assurance that it will monitor the effects of its order and take prompt remedial action. In that case, however, the conditions subject to agency supervision were quite specific observable effects. In contrast, in this case, the point is that there is no objective test by which the Commission or others can appraise the parties' performance. It is not the Commission's assurances which give rise to uncertainty. It is the Commission's reliance upon the parties' assurances, which were conceived in the course of this proceeding, and to which no ascertainable content was given in the decision below or in even now advanced.



### 3. ITT's Potential Activities in Broadcasting and Related Fields

The record in this case shows ITT's resources and interest in broadcasting and in CATV and related fields, prior to its decision to merge with ABC; the merger foreclosed ITT's independent efforts in these fields. The record also shows that ITT is one of a small number of firms capable of advances in communications technology which would provide the basis for greater diversity and competition in broadcasting; its proposed combination with very large broadcast business would give it interests adverse to such developments. In our view, the Commission erred in appraising these issues because:

- (a) it gave controlling weight to testimony of ITT officials as to their intentions, contrary to the anti-trust principle that resources and incentives are the principal measure of potential competition;
- (b) it found that elimination of ITT would not be significant because of the number of comparable firms, without adequate findings as to the existence and nature of such firms; and,
- (c) as to CATV and communications technology, it improperly

relied upon the existence of regulatory and legislative jurisdiction to minimize the importance of eliminating independent aggressive factors.

These arguments were fully developed in our main brief, pp. 49-81, and do not require further elaboration. For purposes of reply, it is significant that the Commission in its brief concedes that "[o]f course, it is of substantial importance to have a large company vigorously pursue a new technological development, even though government consent and regulation are involved" (FCC Br. 49; see also Br. 46). 6/ It is urged that the Commission opinion respected these principles and simply considered the regulatory context as a factor bearing upon ITT's potential activity and its significance. We submit that the opinion below cannot be thus explained away. The Commission, for example, made a specific and separate finding that the issues raised by cable and satellite development "will be resolved by the decisions made by Congress and the Commission, and not by the entry or lack

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6/ In contrast, the companies apparently contest the relevance of this principle (ITT-ABC Br. 27-28).

of entry into the field of any single company" (R. 5304, .  
932). 7/

Similarly, the companies urge that the Commission made no finding about the other potential entrants into broadcasting except insofar as it assumed the Department's contention as to the likelihood of entry by group owners (ITT-ABC Br. 22-25). This misstates our contention which was that ITT would be a likely entrant into net-working after it accomplished its alternative plans for a "sizeable" and "significant" entry into broadcasting, because of an unusual combination of factors, including its financial and technological resources and the advantages

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7/ The Commission's brief (pp. 44-45) describes the "chaotic" regulatory setting of CATV and pay-TV, but this background only emphasizes the defect of relying upon the particularities in 1965-66 as decisive of the long-term potential activities of ITT in these fields. Contrary to the argument of the companies (Br. 26), there would be a substantial competitive impact on broadcasting from the substantial CATV and pay-TV activities contemplated by ITT apart from the national grid which it also considered.

In addition, the companies and (to a lesser extent) the Commission erroneously place in November 1965 ITT's decision to lay aside further expansion in these fields (ITT-ABC Br. 28-29; FCC Br. 42-43). The record is clear that the decision was reached only in January 1966, after ITT discussed the need to obtain ABC's "audit", and to consider the impact of the proposed merger upon ITT's CATV plans (see our main brief, pp. 64-66).

it foresaw for its other operations. It also ignores the unqualified finding of the Commission (R. 5300, ¶18) "that there are many much more likely independent entrants in the television network field." Similar findings were made by the Commission regarding CATV and pay-TV and regarding communications technology, without adequate analysis of the allegedly comparable companies. In the communications technology field, the Commission and the companies seek to support the opinion below by citing testimony of Department witnesses (FCC Br. 47-48; ITT-ABC Br. 35-36). This testimony, however, is in direct conflict with the Commission's finding as to "literally hundreds of manufacturers of equipment in or related to the broadcast market operating in the United States at the present time" (R. 5304, ¶31). Dr. Charyk, Dr. Hill, Mr. Stack and Mr. Visher showed that there is a relatively small number of firms with the resources to develop new forms of broadcast transmission. They confirmed the importance of economic incentives and disincentives, and supported the conclusion that combinations of large broadcast interests and leaders in communications technology are likely to have a detrimental effect upon the possible

achievement and application of innovations contrary to the interest of the existing broadcasting industry.

Nor should the Court be satisfied with the Commission's conclusions, on the ground that it has "day to day exposure to the industry" and "informed experience" to resolve "complex and specialized problems" (ITT-ABC Br. 31, 35). The Commission purported to analyze competitive effects here on the basis of antitrust principles (R. 5294, ¶7), and did not enunciate unique regulatory policies. Experience does not add anything to the findings on the number of companies comparable to ITT, which purport to be based upon standard trade publications (R. 5298, 5302, 5304, ¶¶16, 26, 31). The complete answer, in any event, is that the Commission's expertise is supposed to enable it to make findings susceptible of judicial review. It does not substitute for adequate subsidiary findings on the critical issues.

#### 4. ABC's Autonomy

In its brief, the Commission takes the position that it is "not something inherently impossible" that ABC will be autonomous as a business organization within ITT; but that since the Commission recognized that "this was not a subject free from doubt", the opinion below dealt with the potential adverse effects of a loss of autonomy (FCC Br. 51).

The unwillingness of the Commission, or of the companies, to defend the conclusion of ABC autonomy is in striking contrast to the opinion below. The Commission majority discussed at length the outside directors who were said to insure ABC's independence (R. 5307-9, ¶¶39-43). It made findings based upon purported "common knowledge and experience" concerning the independence of companies within conglomerate corporate organizations (R. 5208-9, ¶¶42, 43); and it quoted at length and relied upon an ITT Policy Guide declaring that "[t]he network and broadcasting operations of ABC shall be kept separate from other

ITT operations" (R. 5309, 5315, 5325, ¶¶44, 57, 80). The Commission went far beyond the thought that there was "some assurance" of "a substantial degree of autonomy" (FCC Br. 51; R. 5309, ¶43). It concluded that the companies' self-serving statements were to be relied upon as descriptive of "the independence of ABC" which "will in fact be followed by ABC and ITT" with respect to regulatory proceedings, the television advertising market, and news and public affairs activities (R. 5310, 5315, 5326, ¶¶44, 57, 80).

To be sure, with respect to the role of ABC in regulatory matters, the opinion below also discussed the consequences on the arguendo assumption that ABC would not operate "with the claimed degree of autonomy" (R. 5310, ¶45). But no such arguendo assumptions were made in the other areas of concern. Indeed, as to news and public affairs, there can be no escape from the fact that the Commission opinion reiterated a reliance upon the business independence of ABC within ITT as one of the critical supports for the



conclusion that the integrity of ABC's news operations would be maintained (R. 5324, 5326, ¶¶78, 81). Both the Commission and the companies, before this Court, ignore this reliance and cite only the independence of the ABC news organization within that company (FCC Br. 59-60; ITT-ABC Br. 47-48).

The Commission and the companies insist that there is nothing "sinister" about the close concern and involvement of ITT's president Geneen in ABC's affairs (FCC Br. 50; ITT-ABC Br. 47). We never said there was. It is quite natural, and to be expected, that Mr. Geneen and ITT management will be intimately involved in ABC--which would be ITT's largest single revenue and profit unit. We have argued that it was absurd for the parties to propose--and for the Commission to accept--findings to the contrary, that ABC officials and decisions would be untrammelled by ITT. The parties' concession on this point has undermined a crucial basis of the decision below.

As to the effects of loss of ABC autonomy, the Commission concluded that there would be no substantial

detriment in the regulatory arena because of the high quality of ITT management and because there is only a small "area of conflicting interest" between ITT and ABC (R. 5310, ¶45). We have previously demonstrated the error of those two reasons. The Commission now seeks to support its opinion by suggesting that ITT has no conflicting interest with respect to a private domestic satellite system and its brief (p. 63) speculates as to the relative weights of ITT's interests as a common carrier and as an equipment manufacturer. Instead of such speculation, the Commission might have noted that, in fact, ITT has participated in the domestic proceeding in opposition to authorization of a private satellite system of the sort vigorously advocated by ABC (Stip. 4, R. 122-32).

The Commission insists that "[o]vert action to influence ABC's news and public affairs coverage . . . would seem to be the most unlikely sort of speculation" (Br. 60), and that regulatory supervision can be relied upon because "evil will out" (Br. 58). These observations are in ironic juxtaposition to the attempt to

dismiss in a footnote (FCC Br. 57 fn. 45) the evidence of ITT's overt efforts to influence independent news media in the course of this proceeding. The Commission plainly erred in finding that only one episode was improper and that it was isolated (See our main brief, pp. 109-113). The Commission was not warranted in assuming that all was well. In the absence of any evidence justifying or mitigating the conduct shown in the record, it was required to find a threat to the future integrity of ABC's news and public affairs activities.

Nor is it obvious that "evil will out". ITT's activities in the course of this proceeding came to light because of their extreme character, because they involved independent news organizations and because they themselves constituted news in the context of this case. There is no similar assurance that overt pressures upon subordinates in the ITT organization would be disclosed. There is even less likelihood that the Commission can rely upon inevitable disclosure to protect against more subtle pressures and against

the accommodation of ABC employees to ITT's interests. Thus, at the hearing in September 1966, one of the Commissioners raised a question about the unusually complete coverage given by NBC to activities of the president of the Philippines on a visit to this country and its possible relation to RCA's commercial involvements in the Philippines (Tr. 236-9). There is no evidence whatever that the Commission had investigated this matter or that it has the authority or the resources to determine whether such influences affected the network's operation.

The companies misconceive our position when they protest against an alleged "xenophobic" suggestion that companies with large foreign interests should be "disqualified" or "absolutely barred" from broadcast licenses (ITT-ABC Br. 52-56). We made no such contention. Our point is, rather, that the Commission could not ignore the influence of ITT's nonbroadcast interests in making its overall evaluation of whether the public interest is served by the merger. This company's foreign activities are not like those of

other broadcast licensees. Its stake in worldwide political events is unusually profound and its contacts and relations with foreign governments are unusually intimate. In assessing the public interest, the Commission was required to recognize the potential detrimental influence of these interests upon ABC. <sup>8/</sup>

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<sup>8/</sup> In its brief, the Commission concedes ITT's "unusually extensive foreign interests", such as are exemplified in the documents with respect to the "Deep Freeze" cable negotiations, states that there is "no dispute" about the "nature of ITT's foreign involvements" and urges that the Commission was fully aware of them (FCC Br. 56-61 fn 49; to the same effect, see ITT-ABC Br. 51-52). The opinion below makes a general statement about such awareness, but proceeded to treat ITT's nonbroadcast interests as completely comparable to those of other licensees (see our main brief, pp. 101-2). The further contention that ABC employees would remain unaware of ITT's interests (FCC Br. 60) is absurd, in view of the contacts even before consummation of the merger (see our main brief, p. 90).

Contrary to the companies' contention (Br. 56), concern over the detrimental effect of ITT's nonbroadcast interests on ABC's news and public affairs is not inconsistent with the argument that the merger foreclosed ITT's potential independent entry into broadcasting and related fields. In the event of independent entry, there would be a very substantial increment of public benefit from the new competition and further diversity, and there would not be the concomitant elimination of an independent ABC. While the Commission would have to recognize the potential detriment from ITT's other interests, it could properly consider that we would be getting something for such risk--the public benefit of additional entry, requiring large resources.

## CONCLUSION

For these reasons and for reasons stated in our main brief, the orders of the Commission should be reversed and set aside.

Respectfully submitted.

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OCTOBER 1967





**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,  
AMICUS CURIAE**

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IN THE

**United States Court of Appeals**

**RECEIVED**

THE DISTRICT OF COLUMBIA CIRCUIT

No. 21147

SEP 7 1967

CLERK OF THE UNITED  
STATES COURT OF APPEALS

UNITED STATES OF AMERICA,

*Petitioner,*

—v.—

FEDERAL COMMUNICATIONS COMMISSION,

*Respondent,*

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION  
and AMERICAN BROADCASTING COMPANIES, INC.,

*Intervenors.*

PETITION TO REVIEW AN ORDER OF THE FEDERAL  
COMMUNICATIONS COMMISSION

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**FILED SEP 29 1967**

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## **QUESTION PRESENTED**

May the Federal Communications Commission Approve a Transfer of Broadcasting Licenses on the Ground that the Commission Can Compel the New Owner to Refrain from Influencing the Broadcast Programs.

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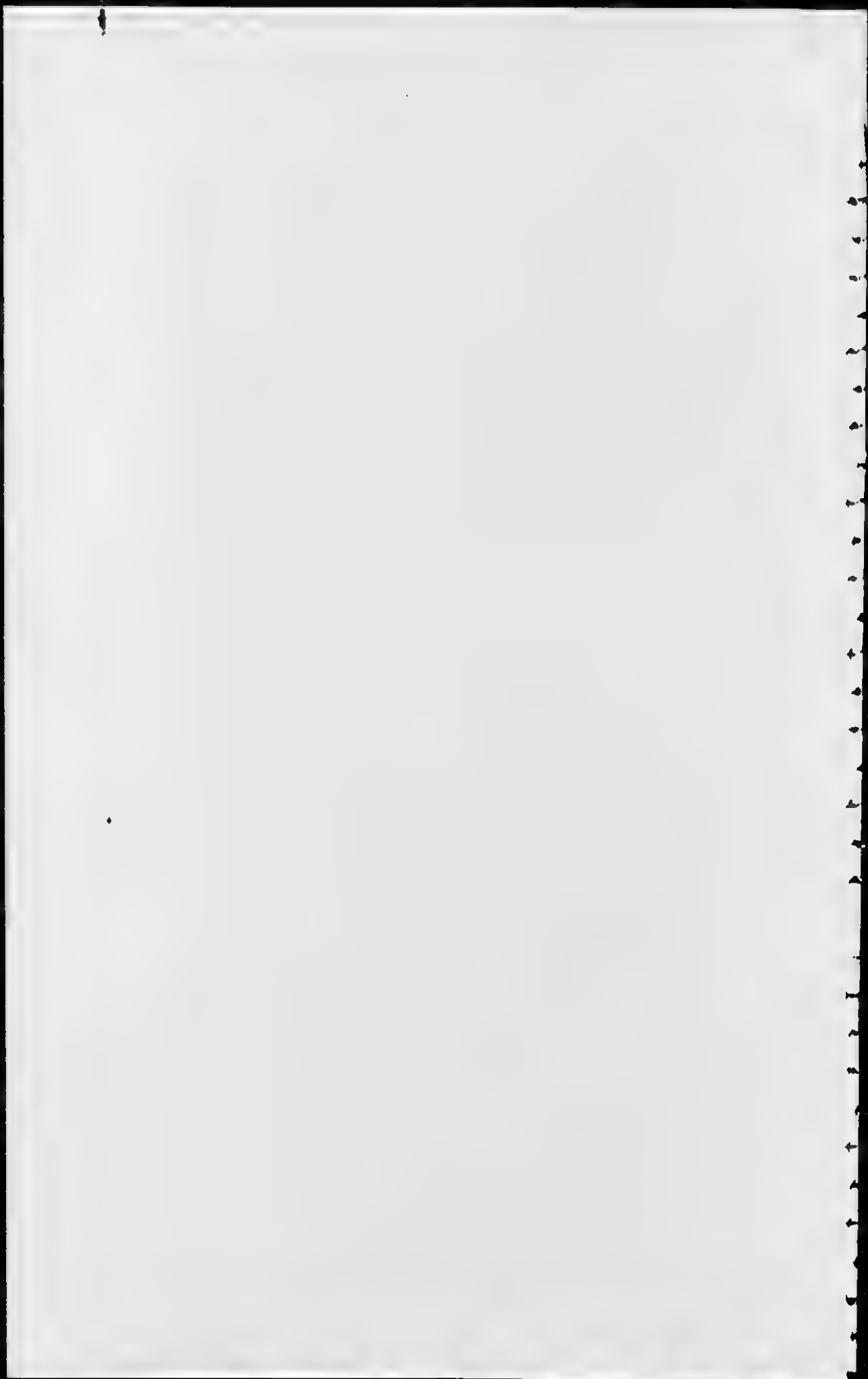
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**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,  
AMICUS CURIAE**

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**Interest of Amicus**

The American Civil Liberties Union is a membership corporation consisting now of approximately 100,000 members, whose sole object is "to maintain throughout the United States and its possessions, the rights of free speech, free press, free assemblage and other civil rights, and to take all legitimate action in furtherance of such purposes." Its interest in broadcasting, and in the Federal Communi-



cations Commission's regulation of broadcasting, derives from its concern for the rights of free expression which, in their application, depend heavily upon access to various means of communication. It has thus frequently sought to persuade broadcasters and networks to adopt policies which it believes would enlarge such access. It has also often sought to persuade the F.C.C., as well as the federal courts upon review of orders of the Commission, to exercise their powers to the same ends.

The interest of amicus is a public interest, comparable to that to which the Commission's statute establishes as a standard for its determinations. Although it has been suggested that such a broad interest in some way weakens the claim of amicus to be heard in the pending matter,<sup>1</sup> the statutory scheme creating the Commission does not, as the applicants have conceded,<sup>2</sup> confine it to hearing only persons or parties pleading a special interest. Even in license renewal proceedings the intended beneficiaries of the Commission's regulatory powers, who reside in affected communities, have an interest which warrants their being heard.<sup>3</sup> Here, where the application for assignment affects 93% of the listening public for whom that power is exercised, the non-economic interests to be served do not thereby become narrower. The very significance of the issues raised in this proceeding speak rather for a broader rule.

The claim of amicus is nevertheless a limited one. Despite the size of the present transaction, or perhaps be-

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<sup>1</sup> Opposition of ITT and ABC to Petition of ACLU for Leave to Intervene (before the F.C.C.), February 14, 1967, p. 8 *et seq.*

<sup>2</sup> *Id.*, at p. 12.

<sup>3</sup> *Office of Communications of the United Church of Christ, et al. v. FCC*, 123 U. S. App. D. C. 328, 359 F. 2d 944 (1966).

cause of it, it is not one that has induced adversely affected commercial interests to oppose the applications or to propose competing ones. Its very size renders more imperative the need for scrutiny—not merely by the Commission and its staff, but also by those outside of Government who are prepared to express the citizens' interest in influencing their Government. The crucial factor here, however, is that the public benefits asserted for the merger, and its asserted disadvantages, both involve the very element of the public interest—freedom of expression through this medium of communication and the consequent diversity of its exercise—that is the explicit purpose of the ACLU's corporate existence.

Even the extraordinarily thorough professional work done on behalf of the applicants and by the Commission staff have subjected the pending proposal to something less than that degree of scrutiny which can be provided in a proceeding contested by opposing parties. The admission of the Department of Justice as a party has gone far towards filling this vacuum, but even its statutory interest is a limited one, encompassing less than the full range of public interest issues posed by the circumstances of the proposed merger. The Broadcast Bureau of the Commission, likewise, has contributed to an analysis of the problem. Nevertheless, we believe there is need for the kind of non-governmental participation in the proceedings which we desire to offer.

The American Civil Liberties Union opposes the merger of the American Broadcasting Companies, Inc., and the International Telephone and Telegraph Corporation. Although denied the right to intervene as a party before the Commission, ACLU was permitted to file a statement opposing the merger and hereby re-affirms that opposition.

The Commission's decision in this case raises an even more significant question of free speech than the one presented by the merger itself. The Federal Communications Act assumes that private ownership of broadcasting stations will serve the public interest only if the owners themselves are held strictly accountable for the programs they broadcast. Protection against conflicting business influences can be secured only through Commission selection of licensees. The Commission's decision, however, assumes that broadcast speech may be protected from conflicting business interests by its regulation of the licensee's internal management. The purpose of this brief is to draw this Court's attention to the absence of authority in the Communications Act for this kind of regulation.

### **Jurisdictional Statement**

Since this is an amicus brief in support of the Justice Department's appeal we rely upon the Jurisdictional Statement in its brief. While we also rely upon that brief for a full statement of the relevant facts, we have summarized in the following Statement of Case the facts most pertinent to our argument.

### **Statement of Case**

#### **1. *The Business Interests Involved.***

The Department of Justice has appealed from Commission approval of the proposed transfer of five television and twelve radio broadcasting stations serving the cities of New York, Chicago, San Francisco, Los Angeles, Pittsburgh and Detroit, pursuant to authority granted by Sec-

tion 310(b) of the Federal Communications Act (47 U. S. C. A. 310(b)).

These transfers are a by-product of a proposed merger between the American Broadcasting Companies, Inc. (ABC), and International Telephone and Telegraph Corporation (ITT). ABC owns and operates the following domestic businesses in addition to these broadcasting stations: a television network, a radio network, 400 motion picture theatres, a record business, a music publisher, and farm newspapers. ABC also owns companies that distribute television programs here and abroad.

ITT's principal income is derived from foreign communications operations. It manufactures telecommunications equipment abroad and operates telecommunication systems for foreign governments in Europe, the Far East, and Latin America. It also owns a world-wide record communication network. Apart from defense and space contracts with the U. S. Government, its domestic business interests were confined to consumer finance, life insurance, investment funds, small loan companies, automobile rentals, and book publishing.

ITT's gross income for 1966 was over two billion dollars and ABC's was 540 million, 414 million of which came from "broadcasting operations." Sixty percent of ITT's gross income is attributable to its foreign communications business.

ABC's stockholders will receive 400 million dollars worth of ITT stock in exchange for their ABC stock. The result will be total ownership of ABC's business by ITT and ITT will become the owner of ABC's broadcasting licenses.

## 2. *The Commission's Authority Over These Businesses.*

The Federal Communications Act gives the Federal Communications Commission no authority to approve or disapprove a merger of corporations that it does not regulate as common carriers. The merger of ABC and ITT came before the Commission only because that merger would transfer the ownership of broadcasting station licenses. The Commission's statutory task is to determine whether this transfer is in the public interest.

In reaching its decision, the Commission may and of course should consider what the probable effect of ITT's acquisition of the ABC network will be on the public interest in the maintenance of an efficient nationwide system of broadcasting. But the primary issue is the probable effect of license transfers on the broadcasts to viewers and listeners in the six cities receiving the service.

A basic premise of the Act is that private commercial incentives do not disqualify licensees from satisfying public broadcasting needs. No limits are set on a licensee's earnings from broadcasting. The main assurance that the licensee will serve the public interest in objective and informative broadcasts is provided by selection of licensees whose earnings will depend on such service. The Commission may not "condition the grant, denial or revocation of a broadcast license upon its own subjective determination of what is or is not a good program." Programming Policy Statement of July 20, 1960 (20 Pike & Fisher), Radio Regulation, 1901 at 1906-07.

The Supreme Court has sustained the Commission in insisting that a broadcasting station licensee may not surrender his freedom and responsibility for program selection

by delegation to a network. *National Broadcasting Co. v. United States*, 319 U. S. 190 (1943). In discharging its own obligation to serve the public interest, the Commission must therefore evaluate the probable impact of a prospective licensee's financial interests upon his broadcasting performance.<sup>4</sup>

### 3. *The Extraordinary Nature of the Commission's Decision.*

In this case the Commission approved a delegation of program responsibility by a licensee (ITT) to subordinate officials, and undertook to enforce the delegation. The Commission apparently assumed that any disqualifying effects resulting from ITT's primary interest in the field of foreign communications, or otherwise, could be cured by an ITT promise to continue operating ABC's broadcasting business much as if ITT had not acquired it. The Commission says it will enforce this promise but does not say how this can or will be done.

The critical Commission finding is number 80, in its second opinion, which reads as follows:

"80. The supplementary record contains numerous reaffirmations of the determination of officials of ABC News, of ABC, and of ITT to maintain the independence and integrity of the ABC news operation free from any interference by either ABC or ITT. These

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<sup>4</sup> The Commission regulates network broadcasting practices only by regulating some of the terms of the contracts by which broadcast licensees affiliate themselves with a network. The networks are not licensed to perform any broadcasting service and the Commission is not empowered to revoke, suspend, or refuse to renew a broadcasting license as a means of regulating the conduct of a network with which the licensee may be affiliated.

assurances are epitomized in the policy statement of ITT regarding ABC, which has been referred to above. AR-4. The ITT policy statement of November 1, 1966 says, inter alia:

"The broadcast licenses which have been granted by the Federal Communications Commission, and which are subject to periodic review and renewal, represent an important public trust as well as one of the most valuable assets of ITT.

\* \* \* \* \*

"The independence of ABC programming from any other ITT commercial or other similar interest shall be inviolate. No officer, employee, or agent of any ITT System company or group shall take any action or make any attempt to influence in any way whatsoever in the news, special events, entertainment, or other programming of the ABC network or stations for the purpose of attempting to further, or to avoid conflict with, the commercial or other interests of an ITT System company or group.

"As pointed out above, this policy statement was made in circumstances such that it was not subject to the charge of being drafted for the purposes of this proceeding. Further, ITT has given assurances of record herein that this policy will not be changed without advance written notice to the Commission. We rely upon these assurances and have ample authority to enforce them.'"

Finding 80 presupposes that (1) officers and employees of ITT will sacrifice the broader interests of ITT's total business to the relatively narrow interests of ABC pro-



gramming, and (2) that the Commission may lawfully compel them to do so.

### **Constitutional and Statutory Provisions Involved**

#### **First Amendment, United States Constitution**

"Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Act of June 19, 1934, c. 652, Title III, 48 Stat. 1081

Section 310(b). "No . . . station license . . . shall be transferred . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby . . ." 47 U. S. C. A. 310(b).

Section 326. "Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications of signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication." 47 U. S. C. A. 326.

### **Statement of Points**

1. The Commission erred in relying upon ITT's assurance that it would not exercise normal management control of the transferred licenses.

2. This error prevented a rational consideration by the Commission of the probable impact of ITT's ownership of the licenses on broadcasting service to the public.

3. The case should therefore be remanded to the Commission with directions to reconsider the proposed license transfers without relying upon assurances by ITT that it will not exercise direct and normal control over broadcast programs.

### Summary of Argument

1. The Commission's power to regulate broadcasting is defined in the Communications Act, and the parties to this proceeding cannot expand that jurisdiction. That jurisdiction includes no power to regulate the business management of the owners or broadcasting licenses. *F. C. C. v. Sanders Bros.*, 309 U. S. 470, 475 (1940).

In deciding whether to permit transfer of a broadcast license, the Commission is obliged to satisfy itself that the new owner will assume direct responsibility for the broadcast programs and be responsive to the needs of the community served by the licensee. A statement by the new owner that he will keep his hands off programming would normally be a ground for refusing approval of the transfer.

The Commission gave no rational explanation for its reliance here on a statement prepared by the merging parties during the hearing, which was evidently intended to assure the Commission that ITT would not control the content of programs broadcast over its network or by its owned and operated stations.

The Act requires the Commission to appraise the probable impact of ITT's conflicting interests on its broadcasting performance; balance the advantages and disadvantages accruing from ITT's ownership; and then either ap-

prove or disapprove the transfer. No such appraisal was made. Instead of evaluating ITT as a broadcast licensee under Communications Act standards, the Commission focused its primary attention on rebutting claims of anti-competitive effects of the ABC-ITT merger, made by the Justice Department. The Commission tried to resolve the conflict of interest issue by reshaping ITT's management situation instead of appraising the probable effect of that situation on ITT's broadcast performance. This the Commission had no power to do. *Regents of Georgia v. Carroll*, 388 U. S. 586 (1950).

2. As a result of its failure to respect its own statutes' concern for free speech the Commission failed to make any rational analysis of the impact of the ABC-ITT merger on the public interest in objective news broadcasts. The Commission's refusal to face the normal consequences of ITT's ownership reflected an irrational view of the relationship between the owners of news media and the news.

Private ownership of the means of mass communications in this country rests on the assumption that the owners will act like owners and assume complete responsibility for what they print or broadcast. If the public is displeased by what the owner says it may penalize him in the pocket-book. We rely on our own resources to protect ourselves from biased newscasts, not the intervention of bureaucrats. No public interest is served by permitting the owner of a broadcasting license to obscure his responsibility for programming behind a facade of meaningless Commission regulation.

3. In substituting an undertaking to prevent a station owner from influencing programs for a critical evaluation

of conflicting business interests, the Commission has simply evaded its statutory responsibilities. The decision should be set aside and the case remanded to the Commission with directions to evaluate ITT as a prospective licensee exercising normal ownership responsibility for broadcast programs.

## ARGUMENT

### I.

The Commission erred in relying upon a statement by the merging parties that ITT would not exercise direct control of the programs broadcast by the transferred stations.

***A. The Commission gave no rational explanation for its reliance on the statement.***

The Commission found that ITT's November 1, 1966, statement "does not appear to have been formulated or issued with any view to its evidentiary effect" because "it was issued *after the first Commission hearing* and before there was any intimation that the Department [of Justice] might seek to intervene in the Commission's proceeding or challenge the proposed merger" (emphasis ours) (Finding 44, p. 19). Since the Department had then had the merger under investigation for some months with the full knowledge of ITT, rational regulators could only assume that the statement was meant to be read by and to influence the Commission or the Department, or both. According to the Commission, however, these circumstances, and the fact that "ITT committed itself to advise the Commission in writing in advance before any change in the

statement is made," justify its conclusion "that it may reasonably rely upon this statement as a statement of the independence of ABC in these matters" (Finding 44). These matters are the way in which ITT will discharge its network responsibilities and the way in which its broadcast licenses will serve the public interest.

The Commission's reliance on this self-serving ITT statement is clear recognition that management by ITT of ABC's broadcasting stations would adversely affect the public interest the Commission is charged with protecting. If normal management by ITT would not be harmful, there would be no occasion to restrict it.

The Commission had before it an economic and engineering survey of the merger benefits that ITT's directors relied on in approving the merger (Ex. J, 238). There are of course more illuminating facts in this pre-merger business document than in any post-merger testimony. One of the attractions in acquiring ABC's broadcasting business was stated to be that "its basic inventory consists of the zero cost assets of time and air" (p. 2). An allocation of the 400 million dollars paid by ITT for ABC's business shows 288 million for the five television stations (about 58 million each), 36 million for the twelve radio stations, and 13 million for the network franchise (p. 7). ITT projects an increase in the annual network profit from ABC's 2 million in 1965 to 17 million for ITT in 1970, or about 30% more than the network's estimated cost (p. 20).

These estimates of cost and profit assume the complete integration of ABC's business with ITT's. It apparently did not occur to the appraisers of this merger as a business proposition that ABC's broadcasting business under ITT's

ownership would continue to be operated as it was by ABC. The Commission's acceptance of contrary assurances from ITT, as a basis for concluding that the transfer would serve the public interest, is inexplicable. Instead of noticing this convincing evidence that ITT took no account of any public service cost of operating these stations, the Commission had eyes only for ITT's dubious promise to serve broadcast viewers and listeners at the expense of its major communications business.

***B. The Commission has no power to enforce the statement.***

Even assuming that the Commission could rationally rely on the promises recited in Finding 80, it has no power to enforce them because it cannot compel ITT's managers to disregard their obligations to ITT's stockholders.

In *Regents of Georgia v. Carroll*, 338 U. S. 586 (1950), the Supreme Court explicitly held that the Commission's power over broadcast licensees did not include the power to relieve them of their duty to comply with state law. The obligations of ITT's officers, directors, and employees to its stockholders are controlled by state law. In the *Regents* case, the Commission insisted that, when it induced a broadcast licensee to abrogate a management contract in order to obtain renewal of its license, the discharged managers could not recover resulting damages in a state court action for breach of contract. The Supreme Court disagreed. It said the Act permitted the Commission to "*make a choice*" only within the scope of its licensing power, i.e., to grant or deny the license *on the basis of the situation of the applicant*. It could insist that the applicant change its situation before it granted a license, but it could not act as a bankruptcy court to change the situation

for the applicant. The public interest, after all, *is in the* effective use of the available channels, and only to that extent is it concerned with the particular applicant who receives the license. The Commission has said frequently that controversies as to rights between licensees and others are outside the ambit of its powers. We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others (338 U. S. at 602) (emphasis added).

The Commission thus has no power to change ITT's situation by altering its legal obligation to its stockholders or interfering with whatever contractual relationships ITT's management chooses to establish in the normal conduct of its business.

Ironically, in *Board of Regents* the Commission was arguing that it needed power to relieve the licensee of liability under a management contract in order to prevent delegation of the licensee's responsibility for broadcast programs. Here, the Commission claims that it has power to enforce delegation of the licensee's program responsibility to prevent the licensee from influencing program content.

In 1962 the Commission again attempted to persuade the Supreme Court that its power over broadcast program content was great enough to supersede state law. The Court was not persuaded. *Head v. New Mexico Board*, 347 U. S. 424, 430. This case made doubly clear that the Commission may not create or enforce license obligations it thinks will protect proper programming at the expense of obligations established by state law. We do not suggest that state law would prevail against a contrary federal statute regulating broadcasting. But here the conflict



is between state law and a Commission requirement directly opposed to the federal statute's requirement of direct responsibility for programming by broadcasting licensees.

In *Farmers Educational and Cooperative Union v. WDAY, Inc.*, 360 U. S. 352 (1959), the Court held that the Communications Act requirement that licensed stations broadcast political speeches relieved the licensees of libel responsibility for the contents of such speeches. But that case has never been thought to justify Commission supervision of management decisions concerning program content. The Supreme Court observed as long ago as 1940 that the Communications Act "does not essay to regulate the business of the licensee. The Commission is given no supervisory control of programs, of business or of policy." *F. C. C. v. Sanders Bros.*, 309 U. S. 470, 475. After citing *Sanders*, *Farmers Educational*, and other Supreme Court cases emphasizing the first amendment limitation on Commission control of broadcast programs (20 R. R. 1907), the Commission concluded in its 1960 Program Policy Statement that these free speech authorities "explain why the day-to-day operation of a broadcast station is primarily the responsibility of the individual station licensee" and that "the fulfillment of the public interest requires the free exercise of his independent judgment" (20 R. R. 1908).

The contrast between the Commission's concern for free speech in its 1960 Program Policy Statement and its 1967 proposal to police ITT's management of 17 broadcasting licenses to see that ITT's ownership does not influence day-to-day broadcasting operations is self-evident. Mistrusting ITT's influence, the Commission proposes to neutralize that influence by accepting and undertaking to en-

force ITT's promise not to let conflicting business interests influence its broadcast programs.

This Court noted the impropriety of reliance on such a solution to a conflict of interest problem in *Citizen's T.V. Protest Committee v. F. C. C.*, 121 U. S. App. D. C. 56, 348 F. 2d 56 (1965). The Court there said the Commission "also denigrates the possible impact of conflicts of interest by reference to Fortnightly's promise of independent and forceful management of WDAY-T.V." 348 F.2d at 60. The Court then noted that the Commission "has not previously relied on promises that a licensee would ignore conflicts of interest among his enterprises, and states no special facts to support it in doing so here." *Id.* at 60. The special facts cited to support reliance on such a promise here are facts that emphasize the impropriety of such reliance.

The curious decision in this case to try to insulate a prospective owner of broadcast licenses from participation in the day-to-day operation of the transferred stations was not foreshadowed by any publicly announced change in Commission policy. As late as July 28, 1965, in its Policy Statement on Comparative Broadcast Hearings (5 R. R.) (2), (1901) the Commission announced that it would give preference to "Full Time Participation in Station Operations by Owners," because when owners "actively participate in day-to-day operation of a station, there is a likelihood of greater sensitivity to an area of changing needs and of programming to meet those needs." *Id.* at 1902, par. 53.24.

There is of course a continuous and inescapable conflict between pressure to use unprofitable programs needed to

serve a broadcaster's community and pressure to maximize station profits. This has led to proposals to Congress to center the responsibility for public service on a newly created network, to be exclusively engaged in the production of non-commercial programs for educational broadcast stations. These proposals have not been adopted and, until they are, adequate protection of the public interest in broadcasting must depend on Commission selection of station owners most likely to depend on broadcast service for their profits. Such selections, while they cannot eliminate normal conflict between public service programming and private profits, can at least prevent the exacerbation of such conflicts. Accepting as licensees, corporations whose principal business interests are unrelated to broadcasting service appears to be the surest way to sacrifice public service to such conflicts.

Talking as though they possess and are prepared to exercise power over a licensee's internal management which they plainly do not have, is irresponsible conduct by the Commission's four-man majority. They are saying, in effect, that if a corporation about to subject itself to their regulation volunteers a management policy statement to justify acquisition of a group of broadcast licensees, they will adopt the statement and enforce it as if it were their own regulatory policy.

*Office of Communications of United Church of Christ v. F. C. C.*, 123 U. S. App. D. C. 328, 345 F. 2d 730, 733, is ample authority to show that a licensee's promise is no substitute for an evaluation of his probable performance. In that case, this Court reversed a one-year renewal of a Jackson, Mississippi, television license, which was based

on the licensee's assurance that it would in the future operate the station in accordance with the Commission's rules. This assurance was not regarded by this Court as sufficient to relieve the Commission of its obligation to hear and evaluate complaints of past violations before granting even a one-year renewal. Thus, a licensee's assurance was rejected as a substitute for Commission evaluation of his performance, even though, in that case, the Commission had undoubted power to enforce the assurance by not renewing the license. Nonetheless, the Commission here has accepted, as a substitute for evaluation of disqualifying new ownership effects, a promise by ITT to behave as if no change in ownership had occurred, a promise the Commission cannot lawfully enforce.

The conflict of interest question posed by this and every other case where a licensee's pursuit of his principal business interests may conflict with his performance of a local broadcast service was extensively explored by the Commission in 1962. In the Matter of Inquiry into Local Television Programming in Chicago, Illinois, Docket No. 14546, it appeared that the three television networks, which owned and operated three of the Chicago stations, "As a practical matter require that O & O stations carry substantially the entire network schedule." This prompted Commissioner Lee to inquire: "How can the licensee in New York really be expected to meet the needs of Chicago and if he delegates complete autonomy to a local official is he delegating his responsibility as a licensee?" Report of the Presiding Commissioner, Robert E. Lee (p. 127).

Here, the delegation sanctioned by the Commission is double, so far as the licensed local broadcast services are concerned. ITT has promised to delegate complete auton-

omy to officials of a subsidiary in performing the ABC network service, and ABC network officials had previously delegated autonomous responsibility to local officials, in performing the broadcast services licensed by the Commission.

The 1962 Chicago hearings unsurprisingly revealed that the economic interest of an owner is likely to win out over "autonomous" management when a conflict develops. It appeared on cross-examination of ABC's autonomous manager of WBKB that his plea to move ABC's television news program from 5:30 to 6:00, Chicago time, on the reasonable ground that most Chicago working people did not get home before 6:00, was overruled by his superiors in New York (Id. at 117, par. 1, Cross-Examination of Sterling C. Quinlan).

The Commission's assumption that it may substitute regulation of a licensee's internal management for appraisal of its conflicting legitimate economic interests is wrong as a matter of law. Since the Commission's own hearings have also shown this assumption to be wrong as a matter of practical experience, the Commission's acceptance of an autonomous management promise as a substitute for evaluation of the probable impact of ITT's conflicting economic interests on its broadcasting performance cannot be sustained.

## II.

**The Commission gave no rational thought to the impact of ITT's acquisition of ABC on the public interest in news broadcasting.**

Although the Commission was dealing with a significant structural change in domestic broadcasting, it says virtually nothing about the existing structure or what a desirable structure would be. Its second opinion dismisses the ACLU suggestion that this structure merits extensive reconsideration by saying "there is nothing to be added to the decision of that issue set forth in our decision, pars. 39, 40." Finding 83. Paragraph 39 merely recites the Justice Department's claim that ITT's acquisition will mean the end of ABC's independence, and paragraph 40 only says that ITT's structure will not affect ABC's independence because the officials of both companies have assured the Commission that it will not have this effect.

However, a franker discussion of the Commission's views about the industry's structure appears in Finding 39 of its original opinion. Here the Commission observes that "there are arguments to be made on both sides" of the issue of whether broadcast licensees should be restricted to broadcasting activities but concludes that "it is too late in the day to argue" that outside business interests—such as manufacturing, church groups, labor groups, and newspaper publishing—are disqualifying. There is no discussion to indicate what, if any, business interests would be disqualifying. There is no citation of any prior transfer case where possible adverse consequences of a shift in ownership were "neutralized" by a commitment to forego

normal ownership rights. This regulatory concept seems to have been invented by lawyers for the merging parties and adopted by the Commission, for lack of a rational ground of approval.

The knotty problem of defining a standard to deal with network acquisitions such as this one is shrugged off by saying, "We cannot in this case adopt standards which when applied in other cases would require us to restructure the industry unless we are prepared to undertake that task" (Finding 39).

Here again the Commission speaks as though it had power it does not have. The Commission could not restructure ITT or any other broadcaster because its power over the broadcasting structure is a negative one. It can influence that structure by accepting or rejecting proposed licensees, but it cannot restructure the licensees. This misconception of the scope of its power over the broadcasting industry is matched by the Commission's inability to comprehend the relation between business structure and business performance.

The Commission simply refuses to assume that corporate owners of economic power are likely to use it for their own benefit. In this respect, the Commission's reliance on ITT President Geneen's testimony is reminiscent of the District Court's reliance on General Motors Chairman Sloan's testimony in *United States v. Dupont*, 353 U. S. 586 (1957), 366 U. S. 316, 331-32 (1961). The Supreme Court there set aside a decree entered by the District Judge on the assumption that divestiture of Dupont's stock in General Motors was unnecessary to remove Dupont's influence over G. M.'s purchasing policies. Dupont and



General Motors witnesses had solemnly assured him that no such drastic relief was necessary, but the Supreme Court realistically assumed that, if Dupont continued to own a controlling block of stock in G. M., Dupont would continue to influence G. M.'s buying policies. Here the Commission speaks of the structure of broadcasting without any apparent realization that owners will act like owners.

The most direct way to show the absurdity of the Commission's inflated view of its regulatory power is to consider the history of the Commission's Big Brother supervision of ITT's business management as it may look in 1984. In that year the Commission might well receive a communication like the following from ITT's chief executive officer:

"Dear Mr. Chairman:

It is with great regret that I announce the formal repeal of the policy statement issued by this company's 1966 management, on which your Commission apparently relied in approving our acquisition of 17 broadcasting licenses owned by ABC before its merger into this company. You are of course aware that nobody supposed this statement would permanently control our policy. The only inhibition against change imposed by the Commission was that we give you advance notification, and we are hereby serving you with formal notice of this change.

However, I think the Commission is entitled to know the reasons for our action. Over the years the Commission's enforcement of the statement has been the occasion for many pleasant contacts between officials of our company and the members of your Commission,

both here and abroad; but there have been some sticky moments.

When we put Ed Gerrity in charge of ABC's programming, the Commissioners who had voted to approve our acquisition of ABC, claimed that this appointment made them look foolish. Gerrity was then our vice-president in charge of public relations and had gotten into a row with Eileen Shanahan over the New York Times coverage of the hearings. He had suggested that the Times ought to have some consideration for the impact of what it wrote about us on the price of our stock.

As vice-president in charge of our public relations, Gerrity was only doing what we had hired him to do. He later proved so able in handling our problems with all news media that in 1971 we put him in charge of our own, ABC, and relieved him of all other duties. Our lawyers assured us that nothing in our 1966 statement could or should prevent ITT from placing its broadcasting operations under the command of an official whose primary loyalty was to our stockholders. Your lawyers finally agreed with ours that Commission displeasure with our executive appointments was not a ground for revoking our broadcast licenses.

Then one of your Commissioners discovered that news programs sponsored by ITT still closed with the announcer's statement that 'this news has been brought to you by ITT.' This practice was begun by us long before we owned any broadcasting interests and is typical of any sponsored news program. However, some members of the Commission seemed to think that our sponsorship of ABC news programs as an advertiser

violated our commitment not to influence broadcast news as an owner. We finally persuaded you that forbidding us to sponsor programs broadcast by our own networks and stations would be nonsensical; but it wasn't easy.

Finally, our selection of newscasters seldom made you happy. When we hired a native of one of the countries where we have extensive business interests a Commissioner told us he should be fired. This newsman's competence was unquestioned but the suggestion was made that this was really a sneaky way to curry favor with a foreign government at the expense of impartial broadcasts.

Since the countries whose communications services we operate cover a wide variety of political systems we refrained for several years from hiring commentators on the news who had any political convictions whatever. But this policy cost us listeners and viewers. We finally decided that it was better to eliminate all news from our television network schedule and turn over programming to a computer. The computer fills our network time with old movies in exact proportion to what they grossed when they played our theatres. However this computer belongs to ITT, was developed with ITT technology, and is so efficient that we are about to license its use to other networks at a handsome profit to ITT. I cannot in good conscience assure you that ITT is not influencing our network programs.

As you know, our network operations are now so profitable that they require no support from our broadcasting stations. We are satisfied that this 1984 revocation of our 1966 policy statement is not a legal basis for revoking any of our broadcasting licenses, but you

should know that they are all for sale. If you can persuade Congress to let you or any other federal agency own and operate television or radio stations we would be happy to turn ours over to the Government at our cost. Our business is now, and has been for the past seventeen years, one in which the operation of local broadcasting stations is relatively unimportant.

Sincerely yours,

George F. Candid."

To sum up, the Commission's first mistake was to suppose that it could overcome ITT's structural defects as a broadcasting licensee by controlling ITT's internal management. This mistake was then compounded by a discussion of broadcasting structure divorced from any thoughtful consideration of business incentives or commission power. The end result was a failure to make any rational appraisal of the probable effect of ITT's business structure upon its broadcasting performance.

### III.

#### CONCLUSION

We do not suggest that plausible reasons for holding that ITT's ownership of ABC would benefit the public interest in broadcasting may not conceivably exist and be articulated in a Commission opinion. But this has not and cannot be done unless the Commission is directed to consider the probable consequences of ITT's ownership, without undertaking to control ITT's business management. Neither ITT's managers of the moment, nor the Commis-

sioners of the moment, can or should try to give any assurance that future managers or Commissioners can or will prevent ITT from managing its entire business as ITT's stockholders think it should be managed. Relying upon management statements made to induce approval and trying to enforce them, is directly contrary to the Act's premise that responsible ownership, rather than Commission supervision over internal management decisions, will best serve the public interest. The Commission's order of approval should therefore be promptly set aside in order that an opinion worthy of plenary judicial consideration may be prepared. Cf. *Melody Music, Inc. v. F. C. C.*, 120 U. S. App. D. C. 241, 345 F. 2d 730, 732.

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